

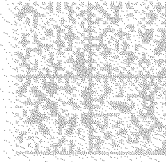


RAILROAD COMMISSION OF TEXAS

1701 NORTH CONGRESS AVENUE ★ POST OFFICE BOX 12967 ★ AUSTIN, TEXAS 78711-2967

OFFICIAL BUSINESS

PRESORTED  
FIRST CLASS



U.S. POSTAGE & MONEY ORDER  
ZIP 76701 \$ 000.40<sup>3</sup>  
02 1W 0001401609 JUN 06 2011

JUN 12 2011

Scott Pruitt, Administrator  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 28221  
Washington, DC 20460



3 DCS-14B 20460

# **COMMENTS OF THE ASSOCIATION OF STATE WETLAND MANAGERS IN RESPONSE TO FEDERALISM CONSULTATION ON WATERS OF THE UNITED STATES**

**JUNE 16, 2017**

These comments were prepared by the Association of State Wetland Managers (ASWM) in response to EPA's federalism consultation under Executive Order 13132. ASWM is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. Our comments were compiled with input from the ASWM Board of Directors and a workgroup of interested members convened for purposes of responding to EPA's request.

Protection of the nation's waters is of paramount concern not only to the federal agencies, but also to states and tribes, as well as local governmental organizations. The important and unique role of states in the management of water resources is clearly recognized in the Clean Water Act (CWA). Any action taken by the federal government to either expand or contract the scope of federal protection will thus have direct and significant impacts on the states. We appreciate the opportunity to advise EPA regarding potential state impacts, and to provide our recommendations regarding the most practical and appropriate approach to cooperative state-federal management and protection of wetlands and other water resources.

## **ASWM RECOMMENDATIONS REGARDING JURISDICTIONAL RULEMAKING**

In light of these and other considerations discussed below, ASWM makes the following recommendations to EPA in regard to their proposed rulemaking to clarify the scope of federal jurisdiction over Waters of the U.S.

1. Future rulemaking should ensure continued federal protection for the nation's critical water resources to maintain or increase supplies of clean, safe water for drinking water and domestic use, agriculture, industry, recreation, fish and wildlife habitat, and other uses which contribute to public health and well-being, to the Nation's economy, and to a safe and healthy environment.

The role of federal regulation in maintaining a level regulatory playing field among the states, and in protecting states from pollution originating from upstream states, should also be recognized.

2. A narrow interpretation of federal jurisdiction over the nation's waters should be avoided given multiple unintended consequences, including:

- Increased pollution and degradation of waters of the states and the nation, and a reduction in supplies of clean, safe water;
  - Disruption of existing state-federal mechanisms that streamline regulatory review under multiple programs for major projects, leading to potential delays and increased cost for overall project approval;
  - Increased costs for states that assume a greater role in permit review and enforcement if the federal role is reduced;
  - Adverse impacts borne unequally among the states. Costs could significantly increase for downstream states that receive increased pollutant loads from upstream states following removal of federal jurisdiction from some waters. Some states would be likely to lose protection over more waters than others, particularly with respect to dredge and fill activities in streams, rivers, lakes and wetlands.
3. To increase clarity and improve the predictability of federal jurisdiction while maintaining protection of vital resources, ASWM recommends an approach that includes these elements:
- Integrated state/tribal and federal cooperation and regulatory review to avoid duplication of effort, and to expedite permit review to the extent possible;
  - Regionalization and recognition that permitting mechanisms already authorized under the CWA such as General Permits and Regional General Permits can be used to tailor the level of permit review to a particular geographic area.
  - Expanded use of flexible but science-based permitting mechanisms such as general permits, regional permits, state programmatic general permits, and state program assumption where appropriate to tailor permitting processes to the scale and types of projects under consideration, the diverse characteristics of waters across the US, and to the specific needs and concerns of states, tribes and permit applicants.
4. ASWM recognizes the Scalia opinion goal of providing jurisdictional limits that are clear, predictable, and understandable. However, we believe that an oversimplified approach to federal jurisdiction under the CWA based primarily on definitions of “relatively permanent waters” and adjacent wetlands with a “continuous surface connection” cannot alone meet these goals. There are no consistent, science-based definitions for these terms, and it is extremely difficult to imagine that any newly-devised definition could be uniformly applicable to the varying geologic, climatic, and hydrologic conditions that occur among the states. We recommend an approach that also includes the elements listed above in item #3.

5. It should be acknowledged that many current regulatory mechanisms developed under the CWA have been largely very effective; uncertainty and associated legal challenges are primarily associated with gray areas such as headwaters (ephemeral waters), man-made waters and remote wetlands. Therefore, we recommend that components of previous regulations that have proven effective be retained, and that the modifications be limited to situations where greater clarity is needed. This will serve to limit the time needed to make modifications, as well as the period of uncertainty associated with ongoing rulemaking.
6. ASWM encourages EPA to consider the findings outlined in the 2013 Science Advisory Board Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, and to ensure that definitions of jurisdictional wetlands and headwater streams account for the significant ecological contributions of more remote wetlands, such as prairie potholes and smaller headwater streams, to overall watershed health. More limited definitions that discount the functions and values of these waters will adversely affect both downstream water quality and increase the risk of flooding, increase water and wastewater treatment costs, and potentially reduce property values in lower reaches of watersheds.
7. Finally, ASWM urges continued collaboration with the states and tribes throughout the rulemaking under consideration. States can identify possible issues with proposed regulatory proposals and recommend potential alternatives early in the process, and assist in responding to the concerns of other stakeholders. That is, the states are willing and able to serve as full partners in the development of regulations, and to develop a more stable and less controversial approach to water resource management and protection.

The foregoing recommendations are supported by the following information and discussion.

#### **THE IMPERATIVE FOR PROTECTION OF THE NATION'S VITAL WATER RESOURCES UNDER THE CLEAN WATER ACT.**

The fundamental need for federal protection of the nation's waters has not diminished since passage of the CWA. On the contrary, there is now growing awareness of the long-term consequences of cumulative point and nonpoint source pollution, which together with aging infrastructure have led to contamination of urban drinking water supplies. Changing weather patterns have increased storm damage and flooding in some locations and produced drought in others, with both social and economic consequences. Multiple stressors are adversely impacting fish and wildlife that also depend upon aquatic systems, leading to loss of biodiversity as well as recreational opportunities which are important to many local economies. Wetlands play an especially critical role in limiting the damage and



high economic loss resulting from natural hazards such as extreme storm events. In many parts of the nation, supplies of clean, safe water are no longer abundant. Our society cannot afford increased pollution, degradation, or loss of increasingly limited clean water resources.

**The economic impacts of removing CWA protection.** The potential economic loss associated with narrowing of jurisdiction under the CWA is uncertain but could be substantial. The benefits of wetland and stream protection stem from the provision of ecosystem services. Narrowing CWA jurisdiction puts these critical systems at risk. The Congressional Research Service (CRS) conducted an economic analysis of the 2015 rule change that clarified jurisdictional determination. In the analysis, the CRS cites that the wetlands protected under this rule change provide public benefits of over \$500 million per year.<sup>1</sup> This includes values ranging from water quality enhancement, habitat for aquatic and other species, support for recreational fishing and hunting, and flood protection.<sup>2</sup> This figure does not include the benefits of protecting water resources such as small streams. Impacts to streams would have impacts on downstream users, pushing up the total loss from reducing protections. Under multiple scenarios, the narrowing of jurisdiction would have negative impacts on local, state, and federal governments in terms of increased costs for water quality enhancements and associated benefits.

Potential economic losses include those arising from a reduction in the supply of safe, clean, useable water for drinking and domestic use, industrial use, agricultural use, recreation, and fish and wildlife habitat. Each of these uses is important to a healthy economy and the increased cost of treatment over time should be carefully evaluated in an economic analysis of lost federal protection arising from a change in federal CWA jurisdiction. As an example of potential economic activity relying on safe, clean, water, the Outdoor Industry Association (OIA) cited waters as being part of the basic infrastructure of outdoor industry infrastructure. In its most recent report (2017), OIA builds upon its previous 2012 study and finds that the spending on outdoor recreation totaled \$887 billion annually, directly supporting 7.6 million jobs and generating in \$124 billion in annual federal, state, and local tax revenue. Many of these activities rely on clean water resources.

The potential loss of federal protection of wetlands and small and possibly mid-sized streams is likely to result in an increase in unregulated dredge and fill activities which would in turn lead to future increased costs at the federal, state, and local level for engineered infrastructure to store flood waters, purify nonpoint source runoff, treat drinking water, sustain recreation opportunities and stabilize shorelines. The loss of protection for wetlands and small streams would likely lead to cumulative impacts reflected in human health threats as well as increased property damage from natural hazards including intense storms, drought, and flooding.

---

<sup>1</sup> EPA & U.S. Army. 2015. Economic Analysis of the EPA-Army Clean Water Rule.

<sup>2</sup> Copeland, C. 2017. EPA and the Army Corps' Rule to Define "Waters of the United States". Congressional Research Service

**There are clear examples of the cost savings from water protection over water treatment.**

*In **Portland, Maine**, The Portland Water District (PWD) maintains low rates for their 200,000 constituents by investing in watershed protection over downstream water treatment. John Talbert, Ph.D. and others at the World Resource Institute conducted a green-gray analysis (GGA) to provide a basis for investing in both natural and built infrastructure alternatives. As development pressures increase, the PWD faces the decision to invest in watershed protection or built alternatives. Over a 20 year period, the PWD would save taxpayers a minimum of \$12 million and up to \$110 million in water treatment costs by implementing green infrastructure projects.*

***Philadelphia, PA** is making similar efforts. By spending \$1.1 billion in green infrastructure projects, the City of Philadelphia provides water quality enhancements while avoiding \$6 billion in grey infrastructure solutions.\* The cumulative impact of the green infrastructure investment is estimated at nearly \$3.2 billion, including benefits from air quality enhancements, water quality improvements from wetland protection, improved aesthetics, and job creation.\*\* These benefits, from cost savings and ecosystem services provision, would not be realized without appropriate protection of wetlands and riparian habitat within the watershed.*

*In **Milwaukee, WI**, the Milwaukee Metropolitan Sewerage District (MMSD) is saving money by investing in green infrastructure. By acquiring land that would be filled for development in the floodplain, the MMSD will save \$45.9 million in capital costs related to flooding and combined sewer overflows while improving habitat and recreational opportunities and increasing carbon sequestration.\*\*\* This is of particular significance in underserved urban service areas, where low-income households spend a larger portion of their income on necessities like water and sewage service. These savings are then injected into the economy in other ways. The proposed rule change puts many of these waterways under threat of poorly designed development, impacting downstream users by reducing water quality and increasing the risk of flooding and combined sewer overflows. This increases costs of water treatment for industrial and residential uses alike and would negatively impact human health if left untreated.*

*\* Green, Jared. "The New Philadelphia Story is About Green Infrastructure". 12/18/2013. Accessed 02/13/17 from <https://dirt.asla.org/2013/12/18/the-new-philadelphia-story-is-about-green-infrastructure/>*

*\*\*Stratus Consulting. August 2009. A Triple Bottom Line Assessment of Traditional and Green Infrastructure Options for Controlling CSO Events in Philadelphia's Watersheds, Final Report. Prepared for: Howard M. Neukrug, Director, Office of Watersheds, City of Philadelphia Water Department. Boulder, CO.*

*\*\*\*CH2MHill. June 2013. Milwaukee Metropolitan Sewerage District Regional Green Infrastructure Plan. MMSD Contract No: M03064P03.*

The EPA estimates that every \$1 spent in protection helps avoid an average of \$27 in future contaminated clean-up costs.<sup>3</sup> Reducing federal protection places the burden of protection on local and state governments to protect their water resources. This becomes difficult as water travels across jurisdictions. Protection at the federal level can reduce the costs for local water users.

**Importance of the federal role in protection of water quality.** Although the states can – and in most instances, do – play a major role in implementation of water programs, the underlying federal authority must provide a strong, stable, and well-researched foundation to protect national resources. A robust, baseline federal level of protection of wetlands and other waters is important to ensure protection of downstream states and tribes from upstream pollutants, and to maintain a “level playing field” when it comes to water. Without federal protection or the replacement by states of permitting programs such as the Section 404 dredge and fill program, downstream states can incur the high cost of treating unregulated pollution from upstream states, or be subject to the loss of clean and safe water supplies.

In addition, federal resources are needed to evaluate the impact and effectiveness of regulations that impact numerous states, and to provide the research needed to improve the effectiveness and efficiency of both state and federal water programs.

**Importance of the fairness and efficiency of regulations.** The need for protection of critical water resources must be balanced with recognition of the impact of regulation on those who rely on and use or impact wetlands and other water resources, including private landowners, business and industry, the agricultural sector, and agencies responsible for public infrastructure including transportation and utilities. The public has a reasonable expectation that regulation of the nation’s natural resources will be clear, predictable, and practical enough to provide for timely decisions, fundamentally based on science and the underlying law and not applied arbitrarily. At the same time, the public has the expectation that the CWA will continue to ensure a supply of clean, safe water for drinking, agricultural use, industrial use, and recreation.

## **FINDING REGULATORY BALANCE AND THE UNINTENDED CONSEQUENCES OF LIMITING FEDERAL JURISDICTION**

Developing regulations which provide both effective protection for waters and practicality/reasonableness is extremely challenging given the immense variability of the Nation’s water resources including widely diverse geography and varying regional scarcity or abundance of water resources, prevalent regional patterns of water use, and climatic conditions. For example, annual precipitation in the lower 48 states varies from less than 10 inches annually in Nevada to over 60 inches in Louisiana. State legal principles underlying water use in the East (generally, reasonable use) are significantly different than in the West (allocated use). Thus, fair and consistent protection of water resources

---

<sup>3</sup> EPA, 1995. BCA of Community Wellhead Protection Volume 1. Office of Ground Water and Drinking Water.

requires a degree of flexibility in implementation at the state level.

**Evolution of Jurisdictional Definitions.** The Clean Water Act as enacted in 1972 and amended in 1977 was farsighted in recognizing the need to balance protection and efficient regulation of water, and recognized the important role of the states in managing water resources. For the most part, state and federal agencies have cooperated effectively to extend protection to the vast majority of the nation's waters with minimal uncertainty. However, clarification of the boundaries between federal and non-federal waters has proven more challenging.

The Supreme Court recognized in *United States v Riverside Bayview Homes* that wetlands adjacent to federal waters must also be protected to achieve CWA goals. In the *SWANCC* case<sup>4</sup>, the Court clearly indicated that there are limits to federal regulation, and excluded use of the migratory bird rule as the sole basis for federal jurisdiction. The Supreme Court decision in *Rapanos v United States* included greater discussion of the limits of federal authority, but without clear consensus as to the definition of those limits. It is now proposed that the federal rule issued in 2015 to clarify jurisdiction be repealed. Greater emphasis on the Scalia opinion within the *Rapanos* decision has been suggested, but as discussed below, ASWM does not believe that the Scalia opinion alone will provide sufficient clarity and predictability to resolve the issue of federal limits on jurisdiction under the CWA. Nor do we believe that all components of the previous 2015 rule were incorrect or wholly lacking in utility since it did identify limits to CWA jurisdiction.

**Evolution of the state role in interwoven state/federal programs.** Cooperative state/federal programs have played a major role in implementation of the CWA over many decades. Given overlapping state and federal authorities, many states have worked with federal agencies to coordinate regulatory review, share information, and reduce duplication of effort, all of which can lead to more efficient and timely decision making. Numerous states also may combine decision making on multiple resource issues in a single review, taking into account for example floodplain regulations, decisions related to water rights and water use, and impacts on fish and wildlife -- in particular on state or federally listed threatened and endangered species. State agencies and their federal partners often complete parallel evaluations under the CWA, including Section 401 Water Quality Certification, and for coastal states a consistency determination under the Coastal Zone Management Act. The Federal Highways Administration has worked with states to facilitate development of consolidated decision making under NEPA and Section 404 of the Clean Water Act. Other state and federal regulations protecting drinking water, historical artifacts, wild and scenic rivers, and other special resources have also been coordinated. In addition, there are other laws whose jurisdiction is defined by CWA jurisdiction including the Oil Pollution Control Act and Oil Spill Trust Funds.

Regardless of the level of state involvement, interwoven state-federal regulatory reviews for routine projects are often carried out in the context of expedited permit processes. In programs such as Section 404 dredge and fill permitting, where thousands of

---

<sup>4</sup> *Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers*

authorizations are requested annually for a wide array of public and private construction or land use activities, expedited permits may be issued within a matter of weeks, while ensuring consistency with multiple related resource regulations. A significant change to CWA jurisdiction would have a direct impact on these coordinated decision-making processes likely leading to delays in permitting decisions, uncertainty and inconsistency during the time it would require for new agreements to be negotiated. Based on past experience these new agreements take time and can only be pursued after a final rule and new guidance on how to implement the rule is in place.

**Existing state dredge and fill programs, and the differing impact of potentially reduced federal regulation.** Twenty-three states have a formal state-level freshwater dredge and fill permitting program that serves as their primary regulatory mechanism for protecting wetlands, streams, rivers, ponds, and lakes, from dredge and fill impacts.<sup>5</sup> Two of these states (Michigan and New Jersey) have “assumed” the §404 permitting program, meaning that they have broad state control over Clean Water Act dredge and fill permitting decisions for the regulating of waters in their state. The other 21 states have varying permitting authority to take over regulation of waters no longer covered by the CWA jurisdiction.

The remaining 27 states rely exclusively on §401 Certifications of federal dredge and fill permits to provide input into the permitting process for disturbances to freshwater wetlands, streams, rivers, ponds and lakes. In these states, regulatory programs do not have the legal capacity to take on regulatory control of activities in waters no longer covered by the federal definition of Waters of the United States. A significant reduction in federal jurisdiction would require these states to create new state permitting programs to address dredge and fill activities in any waters no longer protected under the Clean Water Act. It is unclear how many would be likely to do so.

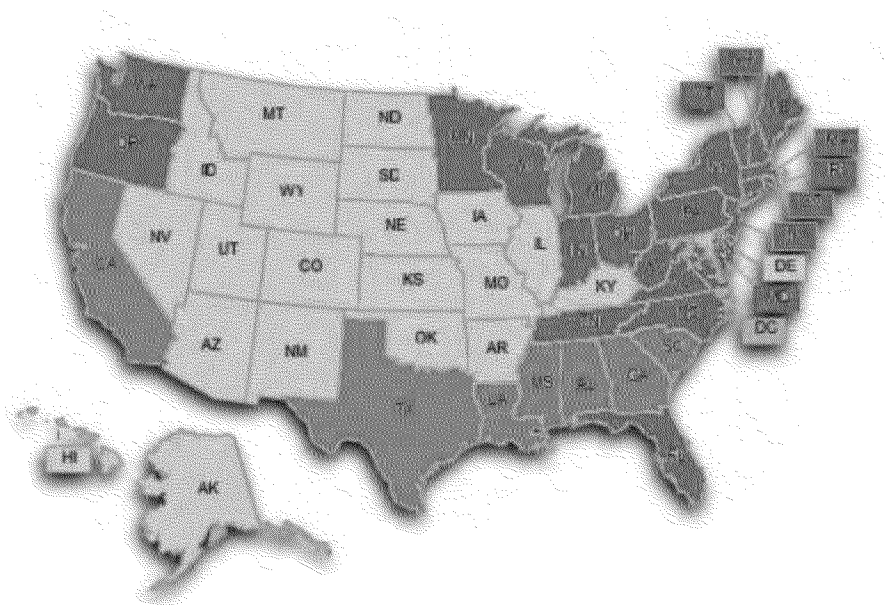
Six of the 27 states that rely primarily on §401 certification do have coastal permitting programs that protects at least some portion of the state’s coastal wetlands and other waters which might provide the basis for developing a statewide dredge and fill permitting program.

A reduction in the scope of federal jurisdiction under the CWA would disproportionately affect western states, where the vast majority of states that rely solely on §401 Certification are located. It is important to note that this area of the country has also been identified as the portion of the country with wetlands in the poorest condition.<sup>6</sup> Since states in the arid west are dominated by ephemeral and intermittent waters, narrowing of federal jurisdiction would likely leave these states with the majority of their wetlands and streams unprotected from dredge and fill activities by either federal or state regulation. A loss of additional regulatory control by states in this part of the country would likely lead to greater degradation of wetlands already in poor condition as well as other waters and reduce the ability of these states to direct how these resources are managed.

---

<sup>5</sup> See *Status and Trends Report on State Wetland Programs in the United States*. Association of State Wetland Managers 2015

<sup>6</sup> National Wetland Condition Assessment - citation



- State Dredge and Fill Permitting Program (23 states)
- Rely on §401 Certification Program + Coastal Program (6 states)
- Rely Solely on §401 Certification (21 states)

**Considering the Scalia Opinion: Would use of Scalia’s definitions alone achieve the goal of increased simplicity and predictability?** In the concluding paragraphs of his opinion on *Rapanos*, Justice Scalia notes the “paucity of information” regarding the waters in question, remanding both cases to determine whether “ditches or drains” are “waters,” and whether the wetlands in question are “adjacent.” In fact, there was a paucity of information in these case files because it appeared obvious to state and federal regulatory staff that the streams in question were waters, and that the wetlands in question were adjacent to those waters. Thus, although Justice Scalia suggests that “common sense” should be used in developing jurisdictional limits, it is clear that he also demands a more nuanced decision regarding the actual scope of jurisdiction. The vagueness of the terms that he chose to use – “relatively permanent” and “continuous surface water connection” would render a jurisdictional rule based on these terms alone less clear, fair, and predictable than previous rules.

However, it is reasonable to “consider” use of Scalia’s opinion, as recommended by the EO. Scalia essentially appears to request two things. Those are: (1) “common sense” definitions of CWA waters and the wetlands adjacent to those waters that are reasonable from the perspective of the public; and (2) recognition of some limit on the extent of jurisdiction under the CWA. Where Justice Kennedy resolved the limits of jurisdiction by requiring analysis of the significant nexus between upstream waters and primary “traditional navigable waters,” Justice Scalia focused on relatively simple definitions of regulated waters.



EPA's initial response to the Executive Order on Waters of the U.S. is focused on two terms used by Justice Scalia - "relatively permanent waters" to define the scope of federal jurisdiction over streams, and "continuous surface connection" to define the extent of federal jurisdiction over adjacent wetlands. However, in spite of the appeal of a simple approach, oversimplification would result in regulations that cannot be applied consistently and with an equivalent degree of fairness on a nationwide basis.

- The hydrologic characteristics, ecology, abundance, and uses of waters vary tremendously across the nation. For example, highly variable intermittent streamflow fed by snowmelt may represent one of the most significant sources of water supplies in the montane west, while the volume of flow of lowland streams in coastal states with abundant water supplies may be relatively stable. Applying the same jurisdictional definitions to such waters would result in radically different impacts on states and their resources. Supporting a definition of "relatively permanent" with metrics such as flow duration would likewise result in regional disparities in the level of protection provided.
- While it would be possible to incorporate both legal concerns and environmental factors related to hydrology, connectivity, ecology, and cumulative impacts into a detailed scientific assessment to define the limit of federal jurisdiction on a case-by-case basis, this approach is very time consuming and highly impractical in the context of an efficient permit process. From the perspective of the potential permit applicant, results are far from predictable. Initial attempts following the *Rapanos* decision to base jurisdiction on a full "significant nexus" evaluation delayed decision making to the point where most Section 404 permit applicants felt obliged to waive a formal delineation of Waters of the U.S. and use a verified preliminary jurisdictional delineation instead.

**ASWM's RECOMMENDATION:  
REGIONALIZATION, INTEGRATED STATE-FEDERAL PROTECTION, AND INCREASED  
ATTENTION TO REGIONALIZED PERMITTING MECHANISMS**

ASWM is recommending an alternative approach that acknowledges Justice Scalia's goals of simplicity and reasonableness, but that also takes advantages of regionalization and other relatively flexible components of the permitting process, including flexible permit mechanisms, to alleviate past objections to CWA jurisdiction.

**Use of state/regional permitting mechanisms.** The CWA authorizes use of general permits to facilitate authorization of actions that have a minimal impact on water resources. In the § 404 Program, a set of *Nationwide* General Permits (NWP) are reauthorized every 5 years, with input from states (including §401 water quality certification and CZMA consistency reviews) and from the public (via a public notice process). In addition, *Regional* General Permits can be issued to address more localized issues. Where NWPs cannot be readily adapted to the needs of a state, they have in several instances been replaced by more specific *State Programmatic* General Permits (SPGP)

(where a state uses its own dredge and fill permitting authority to authorize permits on behalf of the federal government). Thus, general permits offer both the ability to regionalize permits, and to facilitate authorization of actions that are considered minor on either a national or state/regional basis, while at the same time providing protection for water resources. This type of permit can also include conditions that are responsive to the needs of property owners, businesses, and public works agencies, improving timeliness and efficiency of regulatory review.

- Using a mix of individual and general permits, resource managers can protect wetlands and other waters in more remote reaches from types of activities that have a large footprint or would result in significant adverse impacts. However, common and typically less damaging activities in the same waters (e.g. small impacts associated with single family home development) may be of limited concern, and thus may be facilitated through a general permit process.
- General permits are typically tailored to specific activities – that is, the conditions for a highway crossing would not be the same as for a pipeline crossing.
- General permits can be tailored to the geographic and other conditions of a specific state or region accounting for seasonal limits, natural hazards, and likely cumulative effects related to the scarcity or abundance of water resources.
- State specific general permits can be developed to facilitate especially common activities within a state, such as road construction, timber production, utility lines, or wetland restoration.
- General limitations and conditions can be added to protect sensitive or rare ecosystems or species within a state.
- Large and complex projects not covered by general permits will still receive a thorough review commensurate with their potential impact in a given state, regardless of location in mainstream or tributary waters or adjacent wetlands.
- Should violations of regulations occur, both state and federal agencies can contribute to the enforcement effort.
- The complexity of the permit process can be aligned with the waters being regulated and the type of activity authorized, and may or may not require submittal of a discharge notification and public review. The federal process in particular may be minimal where state review is deemed sufficient. Thus, a general permit may alleviate nearly all federal regulatory burden for those waters and actions that need no significant federal review *in a given region, or given parallel state oversight.*

In short, commonly used regulatory processes including general permits provide a great deal of flexibility. We also recognize that even an approach that emphasizes regionalization and regulatory flexibility will require some definition of the limits on federal jurisdiction, likely needing guidance for field interpretation and implementation. However, by providing regulatory relief through alternative mechanisms within “gray areas” those lines will become less critical to the regulated public.

**Integrating and streamlining multiple state, tribal and federal programs.** ASWM believes that it is misleading to consider modifications to the jurisdictional rule without considering all aspects of § 404 and other water permit programs, as well as related federal, state, and local regulations that are routinely interwoven with water permit reviews. For example, exemptions established by the Clean Water Act protect specified activities from permit requirements, even if located in jurisdictional wetlands (in wetlands these include normal agricultural and forestry operations, and many recreational uses).

Moreover, additional minor activities in regulated waters can be authorized under a nationwide, regional, or state general permit that significantly simplifies the permit process, up to and including automatic authorization of activities that meet specified conditions and limitations. Finally, under a SPGP, a Corps permit under the CWA may be automatically issued given approval under an approved state program, limiting federal involvement.

On the other hand, coordination between state and federal programs can greatly facilitate review of complex projects that may require authorization under multiple programs, e.g. floodplain authorities, the Endangered Species Act, CZMA, NEPA (the FWA was worked with states to provide for parallel Section 404 and NEPA review for highway projects), and FERC review of pipeline and utility projects. Coordinated and parallel review of these programs is supported by networks of local, state and federal agencies, and significantly expedites the review of large scale and complex actions. These well-established mechanisms will be lost where federal CWA jurisdiction is narrowed. For example, where an ESA Section 7 consultation is no longer required under a CWA permit, a much costlier and time intensive Section 10 consultation would take its place.

## **RESULTING CONSIDERATIONS FOR RULEMAKING ON FEDERAL CWA JURISDICTION**

If federal jurisdiction is defined narrowly, then any streams, ponds, wetlands, lakes or other waters that are excluded from the definition would receive no protection under the CWA from even the most extreme alteration – such as changing land levels to obliterate these waters for construction, mining, or any other purpose. Thus, if waters that are relied on for a specific purpose such as drinking water, silviculture, surface water for agriculture, stormwater management, or recreation are free from all CWA regulation, then any modification or obliteration of such channels is also unregulated under the primary federal water law. As noted previously the extent of state dredge and fill permitting authority varies widely from state to state. On the other hand, defining jurisdiction in regulation more broadly maintains a national level of protection from unacceptable activities, *while also bringing the rest of the regulatory program into play.* The other components of the

regulatory program can ensure that an appropriate level of review is applied based both on the nature of the water in question AND the type of activity being proposed and its likely impact. Regional realities, state/tribal concerns, and consideration of related programs can also be incorporated into the process.

When considering the regulatory process holistically, a broader interpretation of federal jurisdiction is more appropriate both in regard to the need to protect public trust resources, and to carry out a process of evaluating impacts to public waters in a reasonable manner.



# The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

**Executive Director**

Jeanne Christie  
32 Tandberg Trail, Suite 2A  
Windham ME 04062  
(207) 892-3399

**Executive Director Emeritus**

Jon A. Kusler, Esq.  
1434 Helderberg Trail  
Berne, NY 12023-9746  
(518) 872-1804

**Senior Policy Analyst**

Peg Bostwick  
7521 South Forest Hill Road  
St. Johns, MI 48879  
(517) 388-2214

**Chairman**

Kenneth Murin  
PA Dept. of Environmental Protection  
RCSOB 400 Market Street  
P.O. Box 8460  
Mechanicsburg, PA 17105  
(717) 772-5975

**Vice Chairman**

Tom Harcarik  
OH Environmental Protection Agency  
50 West Town Street  
Columbus, OH 43215  
(614) 644-3639

**Secretary/Treasurer**

Mark Biddle  
DE Dept. of Natural Resources  
and Environmental Control  
820 Silver Lake Blvd., Suite 220  
Dover, DE 19904  
(302) 739-9939

**Members at Large**

Denise Clearwater  
MD Dept. of the Environment

Maryann McGraw  
NM Environment Department

Doug Norris  
MN Dept. of Natural Resources

Timothy Rach  
FL Dept. of Environmental Protection

Bill Ryan  
OR Dept. of State Lands

From: [jeanne.Christie@ASWM.org](mailto:jeanne.Christie@ASWM.org)

To: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov)

CC: Andrew Hanson, [Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)  
ASWM Board

Date: June 16, 2017

Subject: Comments of the Association of State Wetland Managers  
in Response to Federalism Consultation on Waters of the  
United States

The Association of State Wetland Managers is providing the attached comments in response to your request of April 19, 2017, during a presentation by EPA staff relative to their response to the Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States Rule." We deeply appreciate the invitation for consultation with the Association of State Wetland Managers. We welcome future opportunities to consult with EPA and other state organizations as the proposed rulemaking progresses.

Federal protection of the nation's water resources is of increasing importance given our recognition of the limited supply of water for many critical needs from drinking water to irrigation to recreation to manufacturing. It is also important to recognize the vital role played by wetlands and intermittent streams in filtering runoff from developing areas prior to introducing it into the nation's groundwater and surface water supplies and minimizing the impacts of natural hazards such as flooding from increasingly intense storms, reduced winter snowpack and recurring droughts. The federal level of protection also provides security for states from the actions of upstream states, and provides a level playing field among states in terms of the use and alteration of the Nation's waters.

At the same time, we recognize the public need for clarity, consistency, and predictability regarding the extent of federal jurisdiction. The public reasonably expects rules that are science-based, account for regional differences in the extent and use of water, and also acknowledge legal principles governing water use by the public that vary significantly from east to west. Of equal importance is the public expectation that rules will be sufficient to ensure safe, clean water for drinking, commercial and recreational use.

While ASWM understands the desire to simplify regulatory requirements, and to improve the clarity of the federal limits of jurisdiction under the Clean Water Act, we are concerned that an oversimplified approach based on the definitions of "relatively permanent waters" and adjacent wetlands having a "continuous surface connection" can achieve neither goal -- not

the public's expectation for protection of waters nor clarification of the outer boundary of federal regulatory limits. We are further concerned that defining these terms in a way that narrows federal jurisdiction would have significant unintended environmental and economic consequences.

While the opinion of Justice Scalia may inform rulemaking, it is essential that additional regulatory elements be included. We recommend in the attached comments that these elements include (1) regionalization; (2) continued or expanded use of well-integrated state-federal regulatory programs; and (3) increased attention to permitting options such as Regional General Permits, and State Programmatic General Permits. These options can offer refined, streamlined permitting where appropriate for different regions in the country, while providing needed protection. This type of permit can be used to facilitate permitting for particular activities in regions where they are of concern, with appropriate regional conditions, without losing all regulatory control over waters. Maintaining broader jurisdictional boundaries, but using general permit mechanisms to reduce regulatory pressure on specified activities of concern to a state or region, can further both the goals of protecting critical waters and providing fair and effective regulation.

We also believe that federal jurisdiction is already clear in most instances, and that effective components of current regulations should be retained, while focusing revisions on specific areas of concern to the public. We recommend against a totally new approach that fails to incorporate the best elements of the previous rulemaking as we believe this would result in a prolonged period of uncertainty and confusion in both state and federal regulatory programs. We believe the Scalia opinion was never intended to form the sole basis upon which to establish a new clean water jurisdictional definition but that elements of his opinion can help to inform needed modifications.

These general considerations and the potential impact of the proposed step two rulemaking on the states and tribes are detailed in the attached comments. While we have highlighted some of the issues of importance to ASWM, these comments do not express the totality of our concerns, and we anticipate responding with more detailed information as proposed rulemaking proceeds. Please contact me should you have questions regarding ASWM's positions or would find it beneficial to further discuss these issues. We also urge your attention to the specific comments provided by the individual states and tribes, as well as other associations, which may address perspectives, positions or concerns that are also important to informing EPA and the Corps' decision making going forward. The Association is committed to working with you and other stakeholders to address national questions and concerns regarding the protection and the use of wetlands and other waters. Thank you and we look forward to your continued consultation with the states and state associations.

Sincerely,

A handwritten signature in black ink that reads "Jeanne Christie". The signature is fluid and cursive, with the first name "Jeanne" and last name "Christie" clearly distinguishable.

Jeanne Christie  
Executive Director

Attachment



**To:** Downing, Donna[Downing.Donna@epa.gov]  
**From:** Christensen, Damaris  
**Sent:** Thur 6/15/2017 9:00:59 PM  
**Importance:** Normal  
**Subject:** Re: staff asks  
**Received:** Thur 6/15/2017 9:01:01 PM

Let's see how that works.

So, 1. Depending on Karyn's response to my email, Julia for **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**

2. Using Diane (?) to upload comments from email? (See below)

Sent from my iPhone

On Jun 15, 2017, at 4:57 PM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hmmm. How about you suggest in an email to me what you'd like to ask, then I'll reply to you "sounds fine!" at which time you can email Mike directly and indicate you've talked with me and I've concluded it fits into the broader plan for the WOTUS effort. That way we sound (and are) coordinated but we're not creating a hierarchy that could in some circumstances get in the way. What do you think?

BTW, the meeting with the Springfield IL mayor raised no WOTUS issues. Lasted 45 minutes on air issues (no air people there), effluent guidelines (no ELG people there) and state revolving loan fund (was a person from the SRF there!).

Donna

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:44 PM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Subject:** staff asks

Hey Donna,

If I want to ask Mike (or ask Mike to ask someone) for staff time on particular comms related projects, how do you want me to go about doing it? I guess my inclination is to write Mike and copy you, but if you think it makes sense for me to pass to you to pass to Mike I'm ok with that too.

I'm thinking of it in relationship to, say, the ask for Eric's time (while you were out on vacation), or asking Mike to ask Mindy to get the new SEE (Diane?) to help us upload comments from the cwawotus email to the Sharepoint site.

Damaris

**From:** Kwok, Rose  
**To:** Downing, Donna; Christensen, Damaris; Wendelowski, Karyn  
**CC:** Wesson, Dolores  
**Sent:** 6/15/2017 9:00:53 PM  
**Subject:** RE: 101(b) and cooperative federalism

Yep – Damaris had suggested

## Deliberative Process / Ex. 5

**From:** Downing, Donna  
**Sent:** Thursday, June 15, 2017 4:59 PM  
**To:** Kwok, Rose ; Christensen, Damaris ; Wendelowski, Karyn  
**Cc:** Wesson, Dolores  
**Subject:** RE: 101(b) and cooperative federalism

Also

## Deliberative Process / Ex. 5

Donna

**From:** Kwok, Rose  
**Sent:** Thursday, June 15, 2017 4:40 PM  
**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: 101(b) and cooperative federalism

I think

## Deliberative Process / Ex. 5

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:31 PM  
**To:** Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** 101(b) and cooperative federalism

Hey, Karyn.

I talked with Rose this afternoon and have been working to

## Deliberative Process / Ex. 5

# Deliberative Process / Ex. 5

# **Deliberative Process / Ex. 5**

# **Deliberative Process / Ex. 5**

**From:** Kwok, Rose  
**To:** Christensen, Damaris; Wendelowski, Karyn  
**CC:** Downing, Donna; Wesson, Dolores  
**Sent:** 6/15/2017 8:39:42 PM  
**Subject:** RE: 101(b) and cooperative federalism

I think: **Deliberative Process / Ex. 5**

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:31 PM  
**To:** Wendelowski, Karyn  
**Cc:** Kwok, Rose ; Downing, Donna ; Wesson, Dolores  
**Subject:** 101(b) and cooperative federalism

Hey, Karyn.

I talked with Rose this afternoon and have been working

**Deliberative Process / Ex. 5**

# Deliberative Process / Ex. 5

# **Deliberative Process / Ex. 5**



# **Deliberative Process / Ex. 5**

---

**From:** CWAwotus  
**To:** Christensen, Damaris; Downing, Donna  
**CC:** Hanson, Andrew  
**Sent:** 6/15/2017 8:05:24 PM  
**Subject:** FW: AIF/H2O Coalition Ltr on WOTUS  
**Attachments:** WOTUS Ltr. to EPA 6-13-17-Emails.pdf

Is this a state agency? Seems like it's not? If not, we should

Deliberative Process / Ex. 5?

**Deliberative Process / Ex. 5**

**From:** CWAwaters  
**Sent:** Thursday, June 15, 2017 1:43 PM  
**To:** CWAwotus  
**Subject:** FW: AIF/H2O Coalition Ltr on WOTUS

**From:** Brewster B. Bevis [<mailto:BBevis@aif.com>]  
**Sent:** Wednesday, June 14, 2017 9:05 AM  
**To:** CWAwaters <[CWAwaters@epa.gov](mailto:CWAwaters@epa.gov)>; [gib.a.owen.civ@mail.mil](mailto:gib.a.owen.civ@mail.mil)  
**Cc:** Hanson, Andrew <[Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)>; Hanson, Andrew <[Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)>  
**Subject:** AIF/H2O Coalition Ltr on WOTUS

Please find attached a copy of a letter that was mailed yesterday to Administrator Pruitt and DAS Lamont from Associated Industries of Florida and the Florida H2O Coalition, outlining our views on WATUS revisions.

Please let me know if you have any questions.

-Brewster

Brewster B. Bevis  
Senior Vice President - State & Federal Affairs  
Associated Industries of Florida  
Direct: 850-521-2913  
Cell: Personal Phone / Ex. 6

---

**From:** Christensen, Damaris  
**To:** Downing, Donna; Eisenberg, Mindy  
**CC:** Wesson, Dolores  
**Sent:** 6/15/2017 4:19:52 PM  
**Subject:** Tate TPs for review  
**Attachments:** Bennet TPs USCM 6-23-17.docx

Tate is very approachable and friendly when she speaks so I tried to reflect that in some of the framing remarks. The meat of the TPs are identical to our typical TPs however.

There is a possibility something could change in between now and next Thursday. We might

Deliberative Process / Ex. 5

**Deliberative Process / Ex. 5**

Damaris

---

**From:** [Personal Privacy / Ex. 6] CIV USARMY HQDA ASA CW (US)  
**To:** Kupchan, Simma; Eisenberg, Mindy; Downing, Donna; Neugeboren, Steven  
**CC:** Jensen, Stacey M CIV USARMY HQDA (US); Moyer, Jennifer A CIV USARMY CEHQ (US)  
**Sent:** 6/15/2017 2:55:25 PM  
**Subject:** WOTUS2: draft revisions to preamble Army and Corps comments  
**Attachments:** Corps\_WOTUS revision preamble rationale revised 6-14 (002) + Army OGC edits 20170615.docx

Hi Simma et al - Here's the combined Army/Corps comments. I'm going to put these on sharepoint and call Simma too since our email has a tendency to be slow.

Thanks!

[Personal Privacy / Ex. 6]

---

**From:** Neugeboren, Steven  
**To:** Eisenberg, Mindy; Kupchan, Simma  
**CC:** Shapiro, Mike; Goodin, John; Peck, Gregory; Downing, Donna; Kwok, Rose; Christensen, Damaris; McDavit, Michael W.; Wehling, Carrie; Wendelowski, Karyn  
**Sent:** 6/15/2017 2:53:34 PM  
**Subject:** RE: edits to new text in preamble  
**Attachments:** clean version june 14.docx

I want to make sure that these edits are on the draft I sent last night – which I have reattached as a clean version. Lesson learned I should let the attorneys be the ones to ensure version control.

Steven Neugeboren  
Associate General Counsel  
Water Law Office  
Environmental Protection Agency  
202-564-5488

**From:** Eisenberg, Mindy  
**Sent:** Thursday, June 15, 2017 10:29 AM  
**To:** Kupchan, Simma  
**Cc:** Neugeboren, Steven ; Shapiro, Mike ; Goodin, John ; Peck, Gregory ; Downing, Donna ; Kwok, Rose ; Christensen, Damaris ; McDavit, Michael W. ; Wehling, Carrie ; Wendelowski, Karyn  
**Subject:** edits to new text in preamble

Hi Simma,  
Here are a few edits from OWOW on the new text. Let me know when you are done with all of the edits and I can drop it into a clean version of the preamble that includes new language for **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** I'm also wondering if we need further edits to address DOJ's concerns from Tuesday.

Thanks,  
Mindy

Mindy Eisenberg  
Acting Director, Oceans, Wetlands & Communities Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290  
[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

---

**From:** Eisenberg, Mindy  
**To:** Kupchan, Simma  
**CC:** Neugeboren, Steven; Shapiro, Mike; Goodin, John; Peck, Gregory; Downing, Donna; Kwok, Rose; Christensen, Damaris; McDavit, Michael W.; Wehling, Carrie; Wendelowski, Karyn  
**Sent:** 6/15/2017 2:28:39 PM  
**Subject:** edits to new text in preamble  
**Attachments:** WOTUS REVISIONS CLEAN OWOW.docx

Hi Simma,

Here are a few edits from OWOW on the new text. Let me know when you are done with all of the edits and I can drop it into a clean version of the preamble that includes new language for **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

I'm also wondering if we need further edits to address DOJ's concerns from Tuesday.

Thanks,  
Mindy

Mindy Eisenberg  
Acting Director, Oceans, Wetlands & Communities Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290  
eisenberg.mindy@epa.gov



**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]  
**Cc:** Downing, Donna[Downing.Donna@epa.gov]  
**From:** Wendelowski, Karyn  
**Sent:** Wed 6/14/2017 8:06:19 PM  
**Subject:** Re: CWR record

Thanks!

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 14, 2017 4:05 PM  
**To:** Kwok, Rose  
**Cc:** Wendelowski, Karyn; Downing, Donna  
**Subject:** RE: CWR record

**Deliberative Process / ACP Ex. 5**

# Deliberative Process / ACP Ex. 5

**From:** Christensen, Damaris

**Sent:** Wednesday, June 14, 2017 10:36 AM

**To:** Kwok, Rose <Kwok.Rose@epa.gov>

**Cc:** Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Subject:** Re: CWR record

## Deliberative Process / ACP Ex. 5

Sent from my iPhone

On Jun 14, 2017, at 10:06 AM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

## Deliberative Process / ACP Ex. 5

Sent from my iPhone

On Jun 14, 2017, at 10:04 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:

## Deliberative Process / ACP Ex. 5

**To:** Kwok, Rose[Kwok.Rose@epa.gov]  
**Cc:** Wendelowski, Karyn[wendelowski.karyn@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]  
**From:** Christensen, Damaris  
**Sent:** Wed 6/14/2017 8:05:01 PM  
**Subject:** RE: CWR record

# Deliberative Process / ACP Ex. 5

---

**From:** Christensen, Damaris

**Sent:** Wednesday, June 14, 2017 10:36 AM

**To:** Kwok, Rose <Kwok.Rose@epa.gov>

**Cc:** Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Subject:** Re: CWR record

## **Deliberative Process / ACP Ex. 5**

Sent from my iPhone

On Jun 14, 2017, at 10:06 AM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

## **Deliberative Process / ACP Ex. 5**

Sent from my iPhone

On Jun 14, 2017, at 10:04 AM, Wendelowski, Karyn <wendelowski.karyn@epa.gov> wrote:

## **Deliberative Process / ACP Ex. 5**

Message

**From:** Eisenberg, Mindy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=CFB4C26BB6F44C7DB69F9884628B3EF9-EISENBERG, MINDY]  
**Sent:** 6/13/2017 10:09:38 PM  
**To:** Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]  
**Subject:** RE: Draft agenda for WOTUS Wed 10am leadership meeting

Sorry Damaris, but John ended up tweaking my draft agenda and then I just sent a re-tweaked version up. Too much happening.....

Mindy Eisenberg  
Acting Director, Oceans, Wetlands & Communities Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290  
eisenberg.mindy@epa.gov

---

**From:** Christensen, Damaris  
**Sent:** Tuesday, June 13, 2017 5:24 PM  
**To:** Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>  
**Subject:** RE: Draft agenda for WOTUS Wed 10am leadership meeting

Hi all,

John didn't have Donna's agenda at today's meeting and so in his vision the agenda would look a little different. I made a few changes (attached) but what Donna has touches on everything we discussed – just, John didn't realize we were ready to have a 20 min discussion of **Deliberative Process / Ex. 5** I'm going to highlight what I heard John wanting to focus on and where those key points fit in the agenda Donna developed. Mindy you may want to touch base with john before the meeting.

Key differences:

1. John wanted to note that **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**
2. John wanted to review **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** I didn't add any words to the agenda for this.
3. John didn't envision **Deliberative Process / Ex. 5**  
Donna had made TPs and we were well along towards being able to articulate that. NOTE: Cindy commented

that **Deliberative Process / Ex. 5** all things considered so we may need to coordinate timing.

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 4:50 PM  
**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Subject:** FW: Draft agenda for WOTUS Wed 10am leadership meeting

Additional edits.

---

**From:** Kwok, Rose  
**Sent:** Monday, June 12, 2017 6:49 PM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>  
**Subject:** RE: Draft agenda for WOTUS Wed 10am leadership meeting

Just minor edits

---

**From:** Downing, Donna  
**Sent:** Monday, June 12, 2017 5:58 PM  
**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>  
**Cc:** McDavit, Michael W. <[Mcdavit.Michael@epa.gov](mailto:Mcdavit.Michael@epa.gov)>  
**Subject:** Draft agenda for WOTUS Wed 10am leadership meeting

Hi folks:

Attached is the draft agenda for Wednesday's 10am leadership meeting, for your consideration. I used a recent email summary of upcoming meetings for the "Upcoming Meetings" section of the agenda. Damaris, Kathy, and/or Rose, could you review and supplement the list as necessary? Any additions or corrections should go to Mindy and me. Thanks!

Mindy, as requested I will develop a few short TPs on engaging the feds, building off of Damaris' options paper on Sharepoint. Stay tuned...

Donna

Donna Downing  
Jurisdiction Team Leader  
Office of Wetlands, Oceans & Watersheds  
U.S. Environmental Protection Agency  
ph: (202) 566-1367  
[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Delivery Address:  
1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

Message

**From:** Christensen, Damaris [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E04107C23C1043D6967754064C477A29-CHRISTENSEN, DAMARIS]  
**Sent:** 6/13/2017 9:24:22 PM  
**To:** Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]; Eisenberg, Mindy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=cfb4c26bb6f44c7db69f9884628b3ef9-Eisenberg, Mindy]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]  
**Subject:** RE: Draft agenda for WOTUS Wed 10am leadership meeting  
**Attachments:** Agenda -- WOTUS 14 June 2017 RMKDC.docx

Hi all,

John didn't have Donna's agenda at today's meeting and so in his vision the agenda would look a little different. I made a few changes (attached) but what Donna has touches on everything we discussed – just, John didn't realize we were ready to have a 20 min discussion of **Deliberative Process / Ex. 5** I'm going to highlight what I heard John wanting to focus on and where those key points fit in the agenda Donna developed. Mindy you may want to touch base with John before the meeting.

Key differences:

1. John wanted to note that **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**
2. John wanted to review **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**
3. John didn't envision **Deliberative Process / Ex. 5**  
Donna had made TPs and we were well along towards being able to articulate that. NOTE: Cindy commented that **Deliberative Process / Ex. 5** all things considered so we may need to coordinate timing.

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 4:50 PM  
**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** FW: Draft agenda for WOTUS Wed 10am leadership meeting

Additional edits.

---

**From:** Kwok, Rose  
**Sent:** Monday, June 12, 2017 6:49 PM  
**To:** Downing, Donna <Downing.Donna@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>  
**Subject:** RE: Draft agenda for WOTUS Wed 10am leadership meeting

Just minor edits



---

**From:** Downing, Donna

**Sent:** Monday, June 12, 2017 5:58 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>

**Cc:** McDavit, Michael W. <[Mcdavit.Michael@epa.gov](mailto:Mcdavit.Michael@epa.gov)>

**Subject:** Draft agenda for WOTUS Wed 10am leadership meeting

Hi folks:

Attached is the draft agenda for Wednesday's 10am leadership meeting, for your consideration. I used a recent email summary of upcoming meetings for the "Upcoming Meetings" section of the agenda. Damaris, Kathy, and/or Rose, could you review and supplement the list as necessary? Any additions or corrections should go to Mindy and me. Thanks!

Mindy, as requested I will develop a few short TPs on engaging the feds, building off of Damaris' options paper on Sharepoint. Stay tuned...

Donna

Donna Downing  
Jurisdiction Team Leader  
Office of Wetlands, Oceans & Watersheds  
U.S. Environmental Protection Agency  
ph: (202) 566-1367  
[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Delivery Address:  
1301 Constitution Avenue, NW, room 7214-D  
Washington, DC 20004

Message

**From:** Gude, Karen [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=E6565E5DD6BD4FDFBCF069C842177E58-GUDE, KAREN]  
**Sent:** 6/13/2017 4:20:34 PM  
**To:** Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]; Kupchan, Simma [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=784e0aea94a7485fa0435cc0cf5a62a5-SASHER]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Wehling, Carrie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e3e55f11fdc7489698be69849b301da6-CWEHLING]  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call  
**Attachments:** 6-14-17 NTWC-EPA Monthly Call Agenda.docx

Hi All,

Thank you. Based on my conversation with our tribal co-chair, Ken Norton, I understand that the Council would like to have someone on hand to answer Q/A about WOTUS. Though it might be helpful to tee the discussion up with a brief overview of where things are/key issues. I don't know that the questions/issues raised will be super technical --- e.g., Ken was interested in how the past science developed for the CWR would be used moving forward, but having Simma/OGC attend is welcome just in case the conversation does get in depth. With regard to timing, WOTUS is early in the agenda (following intros and a Council report out), and I anticipate the WOTUS discussion will be about 20 minutes. The agenda is attached for reference.

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 12:07 PM  
**To:** Kupchan, Simma <Kupchan.Simma@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Thanks, Simma! That'll be helpful in case there are any legal questions from Ken and others.

---

**From:** Kupchan, Simma  
**Sent:** Tuesday, June 13, 2017 12:03 PM  
**To:** Kwok, Rose <Kwok.Rose@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Just confirming that I can cover this call. Thanks.

Simma Kupchan  
Water Law Office  
US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q  
(p) 202-564-3105

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 11:49 AM  
**To:** Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Hi Karen,

I just wanted to check to make sure that we don't need to present anything at tomorrow's National Tribal Water Council call, but that Ken Norton and others may have some substantive questions in preparation for writing consultation comments. I've also just sent an invite asking Simma or Carrie if they can participate in the event that there are any legal questions that come up, as I believe that Ken may have had some on the national webinar.

Thanks – just wanted to confirm (If we do need a presentation – I'll need to send it to Damaris before I leave).

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 9:16 AM  
**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. Again, thanks, all!!

Damaris, I added you and Rose to the NTWC meeting invitation (I think that you might have already be on the invite list), so that you'll have it on your calendar and receive agendas/any updates as they become available.

Karen

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 07, 2017 9:13 AM  
**To:** Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Cc:** Gude, Karen <Gude.Karen@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. So...

Karen, 2:15 for National Tribal Water Council sounds fine

Rose, we should add these NTWC and NTC meetings to our tribal outreach "list" – and can you copy Carol on that? Thanks.

Kathy, I think almost anyone on the JD team(me, Donna, Rose) can handle substance questions – John and Mindy too. The issue is, there might not yet BE substance on some of the areas they are asking about...

---

**From:** Hurlid, Kathy  
**Sent:** Wednesday, June 07, 2017 9:09 AM

**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>

**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Currently the 14<sup>th</sup> is a hold. I think you are good to do this call with the Tribal Council.

I can do a general call if we need it on the 14<sup>th</sup>. However, WSWC wants another call but it needs to be with someone who knows the substance. They are looking at the 15<sup>th</sup> or 16<sup>th</sup> though.

---

**From:** Christensen, Damaris

**Sent:** Wednesday, June 07, 2017 8:54 AM

**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>

**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

My calendar says there is a state association meeting from 2-4 but I think it might just be a hold. Kathy, is the 6/14 association meeting happening? I know WSWC wants another call. ... So does the National Tribal Water Council.

Kathy, if there is a meeting, can you handle it with just you and maybe Julia or Dolores or Brittany? Maybe if we put me on the agenda early for the NTWC?

Damaris

---

**From:** Kwok, Rose

**Sent:** Wednesday, June 07, 2017 8:45 AM

**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>

**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** Re: WOTUS Updates for 6/14 NTWC Monthly Call

Oh that's right! How about Damaris?

Sent from my iPhone

On Jun 7, 2017, at 8:43 AM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hi Karen:

Thanks for the cc. Unfortunately, I'll be on a plane coming back from a presentation in Pittsburgh, otherwise I'd be delighted to sit in and answer NTWC's questions. Sorry.

Donna

---

**From:** Gude, Karen

**Sent:** Wednesday, June 07, 2017 8:36 AM

**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Rose,

Hi. I spoke to Ken Norton, the National Tribal Water Council chair, yesterday, and he indicated that he is currently working on the NTWC's draft consultation comments and had some substantive questions/wanted to be able to have more of a substantive conversation with the Council reps during next Wednesday's NTWC. Understanding that you will be out of the office at NCAI next Wed, and staffing is tight on WOTUS, I wanted to see if it might be possible to have someone from the WOTUS team on hand to answer potential questions from Council members on WOTUS. (Sorry for the change in course.)

I can be flexible on timing/agenda for the call. I don't anticipate it would be more than about 15-20 minutes of someone's time. Given that you are out of the office, I am cc'ing Donna and Damaris, for awareness.

Thank you,

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

---

**From:** Gude, Karen  
**Sent:** Tuesday, June 06, 2017 10:37 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>  
**Subject:** WOTUS Updates for 6/14 NTWC Monthly Call

Hi Rose,

Just a reminder that next Wednesday, 6/14, from 2:00 – 3:30 PM EDT is the monthly NTWC call. I'm working through the draft agenda now (attached for reference), and plan to include an quick update on WOTUS consultation, with several other regulatory/consultation updates. The NTWC will be following the NCAI tribal listening session.

Given that you'll be at NCAI, I would be happy to update the Council on the latest consultation/outreach efforts and the latest with respect to the step 1 rulemaking, should an announcement have been made by then. If you would like to participate and/or to have someone from OWOW participate in the NTWC call to provide updates to the Council, please just let me know.

The one follow up on WOTUS from the last call related to: **Deliberative Process / Ex. 5**

## Deliberative Process / Ex. 5

Thanks!  
Karen  
(202) 564-0831

---

**Subject:** National Tribal Water Council - EPA Monthly Call  
**Location:** DCRoomEast2369B/DC-ICC-OW-IO; Call in:

**Personal Email / Ex. 6**

**Start:** Wed 6/14/2017 2:00 PM  
**End:** Wed 6/14/2017 3:30 PM

**Recurrence:** Monthly  
**Recurrence Pattern:** the second Wednesday of every 1 month(s) from 2:00 PM to 3:30 PM

**Meeting Status:** Meeting organizer

**Organizer:** Gude, Karen  
**Required Attendees:** Russell, Sam; Williams, James; Hall, Beth; Lopez-Carbo, Maria; Buffo, Corey; Anderson, Danielle; Leutner, Fred; Ruge, Zoe; Bathersfield, Nizanna; Hudiburgh, Gary; Delehanty, Robyn; Stabenfeldt, Lynn; Chemerys, Ruth; Epting, Steve; Holdsworth, Susan; Shumway, Laura; Kutschenreuter, Kathleen; Christensen, Damaris; Soscia, Marylou; Gardner, Thomas; Binder, Jonathan; Jones, Fran; Pamela Blasdel; **Personal Email / Ex. 6** [michbolt@nc-chokeee.com](mailto:michbolt@nc-chokeee.com); [dan.kusnierz@penobscotnation.org](mailto:dan.kusnierz@penobscotnation.org); [rrickard@hetf.org](mailto:rrickard@hetf.org); [nancyschuldt@fdlrez.com](mailto:nancyschuldt@fdlrez.com); [memarthla@sctribe.com](mailto:memarthla@sctribe.com); Denise Jensen; [clarrick@utemountain.org](mailto:clarrick@utemountain.org); [emorrison-dia@gci.net](mailto:emorrison-dia@gci.net); **Personal Email / Ex. 6**; [philc@cdatribe-nsn.gov](mailto:philc@cdatribe-nsn.gov); [slivernore@pci-nsn.gov](mailto:slivernore@pci-nsn.gov); [jamesh@nezperce.org](mailto:jamesh@nezperce.org); Temple, Leslie; Davis, CatherineM; Richardson, Matthew; Negash, Lily

**Optional Attendees:** Upton, Jennifer; Nasir, Iqra  
**Resources:** DCRoomEast2369B/DC-ICC-OW-IO

**Conference Number:** **Nonresponsive Conference Code/ Ex. 6**

Message

**From:** Kwok, Rose [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D3D2987BA8F246A5A9E37773201FD180-KWOK, ROSE]  
**Sent:** 6/13/2017 4:06:48 PM  
**To:** Kupchan, Simma [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=784e0aea94a7485fa0435cc0cf5a62a5-SASHER]; Gude, Karen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e6565e5dd6bd4fdfbcf069c842177e58-Gude, Karen]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Wehling, Carrie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e3e55f11fdc7489698be69849b301da6-CWEHLING]  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Thanks, Simma! That'll be helpful in case there are any legal questions from Ken and others.

---

**From:** Kupchan, Simma  
**Sent:** Tuesday, June 13, 2017 12:03 PM  
**To:** Kwok, Rose <Kwok.Rose@epa.gov>; Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Just confirming that I can cover this call. Thanks.

Simma Kupchan  
Water Law Office  
US EPA Office of General Counsel  
William Jefferson Clinton Building North Room 7426Q  
(p) 202-564-3105

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 11:49 AM  
**To:** Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Hi Karen,

I just wanted to check to make sure that we don't need to present anything at tomorrow's National Tribal Water Council call, but that Ken Norton and others may have some substantive questions in preparation for writing consultation comments. I've also just sent an invite asking Simma or Carrie if they can participate in the event that there are any legal questions that come up, as I believe that Ken may have had some on the national webinar.

Thanks – just wanted to confirm (If we do need a presentation – I'll need to send it to Damaris before I leave).

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 9:16 AM  
**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose

<Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. Again, thanks, all!!

Damaris, I added you and Rose to the NTWC meeting invitation (I think that you might have already be on the invite list), so that you'll have it on your calendar and receive agendas/any updates as they become available.

Karen

---

**From:** Christensen, Damaris

**Sent:** Wednesday, June 07, 2017 9:13 AM

**To:** Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Cc:** Gude, Karen <Gude.Karen@epa.gov>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. So...

Karen, 2:15 for National Tribal Water Council sounds fine

Rose, we should add these NTWC and NTC meetings to our tribal outreach "list" – and can you copy Carol on that?  
Thanks.

Kathy, I think almost anyone on the JD team(me, Donna, Rose) can handle substance questions – John and Mindy too. The issue is, there might not yet BE substance on some of the areas they are asking about...

---

**From:** Hurlid, Kathy

**Sent:** Wednesday, June 07, 2017 9:09 AM

**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Cc:** Gude, Karen <Gude.Karen@epa.gov>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Currently the 14<sup>th</sup> is a hold. I think you are good to do this call with the Tribal Council.

I can do a general call if we need it on the 14<sup>th</sup>. However, WSWC wants another call but it needs to be with someone who knows the substance. They are looking at the 15<sup>th</sup> or 16<sup>th</sup> though.

---

**From:** Christensen, Damaris

**Sent:** Wednesday, June 07, 2017 8:54 AM

**To:** Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

**Cc:** Gude, Karen <Gude.Karen@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

My calendar says there is a state association meeting from 2-4 but I think it might just be a hold. Kathy, is the 6/14 association meeting happening? I know WSWC wants another call. ... So does the National Tribal Water Council.

Kathy, if there is a meeting, can you handle it with just you and maybe Julia or Dolores or Brittany? Maybe if we put me on the agenda early for the NTWC?

Damaris



---

**From:** Kwok, Rose  
**Sent:** Wednesday, June 07, 2017 8:45 AM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** Re: WOTUS Updates for 6/14 NTWC Monthly Call

Oh that's right! How about Damaris?

Sent from my iPhone

On Jun 7, 2017, at 8:43 AM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hi Karen:

Thanks for the cc. Unfortunately, I'll be on a plane coming back from a presentation in Pittsburgh, otherwise I'd be delighted to sit in and answer NTWC's questions. Sorry.

Donna

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 8:36 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>  
**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Rose,

Hi. I spoke to Ken Norton, the National Tribal Water Council chair, yesterday, and he indicated that he is currently working on the NTWC's draft consultation comments and had some substantive questions/wanted to be able to have more of a substantive conversation with the Council reps during next Wednesday's NTWC. Understanding that you will be out of the office at NCAI next Wed, and staffing is tight on WOTUS, I wanted to see if it might be possible to have someone from the WOTUS team on hand to answer potential questions from Council members on WOTUS. (Sorry for the change in course.)

I can be flexible on timing/agenda for the call. I don't anticipate it would be more than about 15-20 minutes of someone's time. Given that you are out of the office, I am cc'ing Donna and Damaris, for awareness.

Thank you,

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

---

**From:** Gude, Karen  
**Sent:** Tuesday, June 06, 2017 10:37 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>  
**Subject:** WOTUS Updates for 6/14 NTWC Monthly Call

Hi Rose,

Just a reminder that next Wednesday, 6/14, from 2:00 – 3:30 PM EDT is the monthly NTWC call. I'm working through the draft agenda now (attached for reference), and plan to include an quick update on WOTUS consultation, with several other regulatory/consultation updates. The NTWC will be following the NCAI tribal listening session.

Given that you'll be at NCAI, I would be happy to update the Council on the latest consultation/outreach efforts and the latest with respect to the step 1 rulemaking, should an announcement have been made by then. If you would like to participate and/or to have someone from OWOW participate in the NTWC call to provide updates to the Council, please just let me know.

The one follow up on WOTUS from the last call related to **Deliberative Process / Ex. 5**

## Deliberative Process / Ex. 5

Thanks!  
Karen  
(202) 564-0831

-----

**Subject:** National Tribal Water Council - EPA Monthly Call  
**Location:** DCRoomEast2369B/DC-ICC-OW-IO; Call in: **Nonresponsive Conference Code/ Ex. 6**

**Start:** Wed 6/14/2017 2:00 PM  
**End:** Wed 6/14/2017 3:30 PM

**Recurrence:** Monthly  
**Recurrence Pattern:** the second Wednesday of every 1 month(s) from 2:00 PM to 3:30 PM

**Meeting Status:** Meeting organizer

**Organizer:** Gude, Karen  
**Required Attendees:** Russell, Sam; Williams, James; Hall, Beth; Lopez-Carbo, Maria; Buffo, Corey; Anderson, Danielle; Leutner, Fred; Ruge, Zoe; Bathersfield, Nizanna; Hudiburgh, Gary; Delehanty, Robyn; Stabenfeldt, Lynn; Chemerys, Ruth; Epting, Steve; Holdsworth, Susan; Shumway, Laura; Kutschenreuter, Kathleen; Christensen, Damaris; Soscia, Marylou; Gardner, Thomas; Binder, Jonathan; Jonesi, Fran; Pamela Blasdel; **Personal Email / Ex. 6** [michbolt@nc-chokekee.com](mailto:michbolt@nc-chokekee.com); [dan.kusnierz@penobscotnation.org](mailto:dan.kusnierz@penobscotnation.org); [rrickard@hetf.org](mailto:rrickard@hetf.org); [nancyschuldt@fdlrez.com](mailto:nancyschuldt@fdlrez.com); [memarthla@sctribe.com](mailto:memarthla@sctribe.com); Denise Jensen; [clarrick@utemountain.org](mailto:clarrick@utemountain.org); [emorrison-dia@gci.net](mailto:emorrison-dia@gci.net); **Personal Email / Ex. 6** [philc@cdatribe-nsn.gov](mailto:philc@cdatribe-nsn.gov); [slivernore@pci-nsn.gov](mailto:slivernore@pci-nsn.gov); [jamesh@nezperce.org](mailto:jamesh@nezperce.org); Temple, Leslie; Davis, CatherineM; Richardson, Matthew; Negash, Lily

**Optional Attendees:** Upton, Jennifer; Nasir, Iqra  
**Resources:** DCRoomEast2369B/DC-ICC-OW-IO

Conference Number: **Nonresponsive Conference Code/ Ex. 6**



Message

**From:** Kupchan, Simma [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=784E0AEA94A7485FA0435CC0CF5A62A5-SASHER]  
**Sent:** 6/13/2017 4:03:10 PM  
**To:** Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]; Gude, Karen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e6565e5dd6bd4fd9bcf069c842177e58-Gude, Karen]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Wehling, Carrie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e3e55f11fdc7489698be69849b301da6-CWEHLING]  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Just confirming that I can cover this call. Thanks.

Simma Kupchan  
Water Law Office  
US EPA Office of General Counsel  
William Jefferson Clinton Building North Room 7426Q  
(p) 202-564-3105

---

**From:** Kwok, Rose  
**Sent:** Tuesday, June 13, 2017 11:49 AM  
**To:** Gude, Karen <Gude.Karen@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>  
**Cc:** Downing, Donna <Downing.Donna@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Hi Karen,

I just wanted to check to make sure that we don't need to present anything at tomorrow's National Tribal Water Council call, but that Ken Norton and others may have some substantive questions in preparation for writing consultation comments. I've also just sent an invite asking Simma or Carrie if they can participate in the event that there are any legal questions that come up, as I believe that Ken may have had some on the national webinar.

Thanks – just wanted to confirm (If we do need a presentation – I'll need to send it to Damaris before I leave).

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 9:16 AM  
**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. Again, thanks, all!!

Damaris, I added you and Rose to the NTWC meeting invitation (I think that you might have already be on the invite list), so that you'll have it on your calendar and receive agendas/any updates as they become available.

Karen

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 07, 2017 9:13 AM  
**To:** Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. So...

Karen, 2:15 for National Tribal Water Council sounds fine

Rose, we should add these NTWC and NTC meetings to our tribal outreach "list" – and can you copy Carol on that?  
Thanks.

Kathy, I think almost anyone on the JD team(me, Donna, Rose) can handle substance questions – John and Mindy too.  
The issue is, there might not yet BE substance on some of the areas they are asking about...

---

**From:** Hurlid, Kathy  
**Sent:** Wednesday, June 07, 2017 9:09 AM  
**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Currently the 14<sup>th</sup> is a hold. I think you are good to do this call with the Tribal Council.  
I can do a general call if we need it on the 14<sup>th</sup>. However, WSWC wants another call but it needs to be with someone who knows the substance. They are looking at the 15<sup>th</sup> or 16<sup>th</sup> though.

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 07, 2017 8:54 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

My calendar says there is a state association meeting from 2-4 but I think it might just be a hold. Kathy, is the 6/14 association meeting happening? I know WSWC wants another call. ... So does the National Tribal Water Council.

Kathy, if there is a meeting, can you handle it with just you and maybe Julia or Dolores or Brittany? Maybe if we put me on the agenda early for the NTWC?

Damaris

---

**From:** Kwok, Rose  
**Sent:** Wednesday, June 07, 2017 8:45 AM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** Re: WOTUS Updates for 6/14 NTWC Monthly Call

Oh that's right! How about Damaris?

Sent from my iPhone

On Jun 7, 2017, at 8:43 AM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hi Karen:

Thanks for the cc. Unfortunately, I'll be on a plane coming back from a presentation in Pittsburgh, otherwise I'd be delighted to sit in and answer NTWC's questions. Sorry.

Donna

---

**From:** Gude, Karen

**Sent:** Wednesday, June 07, 2017 8:36 AM

**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Rose,

Hi. I spoke to Ken Norton, the National Tribal Water Council chair, yesterday, and he indicated that he is currently working on the NTWC's draft consultation comments and had some substantive questions/wanted to be able to have more of a substantive conversation with the Council reps during next Wednesday's NTWC. Understanding that you will be out of the office at NCAI next Wed, and staffing is tight on WOTUS, I wanted to see if it might be possible to have someone from the WOTUS team on hand to answer potential questions from Council members on WOTUS. (Sorry for the change in course.)

I can be flexible on timing/agenda for the call. I don't anticipate it would be more than about 15-20 minutes of someone's time. Given that you are out of the office, I am cc'ing Donna and Damaris, for awareness.

Thank you,

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

---

**From:** Gude, Karen

**Sent:** Tuesday, June 06, 2017 10:37 AM

**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Subject:** WOTUS Updates for 6/14 NTWC Monthly Call

Hi Rose,

Just a reminder that next Wednesday, 6/14, from 2:00 – 3:30 PM EDT is the monthly NTWC call. I'm working through the draft agenda now (attached for reference), and plan to include an quick update on WOTUS consultation, with several other regulatory/consultation updates. The NTWC will be following the NCAI tribal listening session.

Given that you'll be at NCAI, I would be happy to update the Council on the latest consultation/outreach efforts and the latest with respect to the step 1 rulemaking, should an announcement have been made

by then. If you would like to participate and/or to have someone from OWOW participate in the NTWC call to provide updates to the Council, please just let me know.

The one follow up on WOTUS from the last call related to

**Personal Email / Ex. 6**

# Personal Email / Ex. 6

Thanks!  
Karen  
(202) 564-0831

-----

**Subject:** National Tribal Water Council - EPA Monthly Call  
**Location:** DCRoomEast2369B/DC-ICC-OW-IO; Call in: **Nonresponsive Conference Code/ Ex. 6**

**Start:** Wed 6/14/2017 2:00 PM  
**End:** Wed 6/14/2017 3:30 PM

**Recurrence:** Monthly  
**Recurrence Pattern:** the second Wednesday of every 1 month(s) from 2:00 PM to 3:30 PM

**Meeting Status:** Meeting organizer

**Organizer:** Gude, Karen  
**Required Attendees:** Russell, Sam; Williams, James; Hall, Beth; Lopez-Carbo, Maria; Buffo, Corey; Anderson, Danielle; Leutner, Fred; Ruge, Zoe; Bathersfield, Nizanna; Hudiburgh, Gary; Delehanty, Robyn; Stabenfeldt, Lynn; Chemerys, Ruth; Epting, Steve; Holdsworth, Susan; Shumway, Laura; Kutschenreuter, Kathleen; Christensen, Damaris; Soscia, Marylou; Gardner, Thomas; Binder, Jonathan; Jonesi, Fran; Pamela Blasdel; **Personal Email / Ex. 6** [michbolt@nc-choke.com](mailto:michbolt@nc-choke.com); [dan.kusnierz@penobscotnation.org](mailto:dan.kusnierz@penobscotnation.org); [rrickard@hetf.org](mailto:rrickard@hetf.org); [nancyschuldt@fdlrez.com](mailto:nancyschuldt@fdlrez.com); [memarthla@sctribe.com](mailto:memarthla@sctribe.com); Denise Jensen; [clarrick@utemountain.org](mailto:clarrick@utemountain.org); [emorrison-dia@gci.net](mailto:emorrison-dia@gci.net); **Personal Email / Ex. 6** [philc@cdatribe-nsn.gov](mailto:philc@cdatribe-nsn.gov); [slivermore@pci-nsn.gov](mailto:slivermore@pci-nsn.gov); [jamesh@nezperce.org](mailto:jamesh@nezperce.org); Temple, Leslie; Davis, CatherineM; Richardson, Matthew; Negash, Lily

**Optional Attendees:** Upton, Jennifer; Nasir, Iqra  
**Resources:** DCRoomEast2369B/DC-ICC-OW-IO

**Conference Number:** **Nonresponsive Conference Code/ Ex. 6**

Message

**From:** Kwok, Rose [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D3D2987BA8F246A5A9E37773201FD180-KWOK, ROSE]  
**Sent:** 6/13/2017 3:49:09 PM  
**To:** Gude, Karen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e6565e5dd6bd4dfbfc069c842177e58-Gude, Karen]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]; Kupchan, Simma [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=784e0aea94a7485fa0435cc0cf5a62a5-SASHER]  
**CC:** Downing, Donna [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d853e50d3a2b489daf2cc498c052e3d6-DDowning]; Wehling, Carrie [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e3e55f11fdc7489698be69849b301da6-CWEHLING]  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Hi Karen,

I just wanted to check to make sure that we don't need to present anything at tomorrow's National Tribal Water Council call, but that Ken Norton and others may have some substantive questions in preparation for writing consultation comments. I've also just sent an invite asking Simma or Carrie if they can participate in the event that there are any legal questions that come up, as I believe that Ken may have had some on the national webinar.

Thanks – just wanted to confirm (If we do need a presentation – I'll need to send it to Damaris before I leave).

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 9:16 AM  
**To:** Christensen, Damaris <Christensen.Damaris@epa.gov>; Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. Again, thanks, all!!

Damaris, I added you and Rose to the NTWC meeting invitation (I think that you might have already be on the invite list), so that you'll have it on your calendar and receive agendas/any updates as they become available.

Karen

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 07, 2017 9:13 AM  
**To:** Hurlid, Kathy <Hurlid.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Cc:** Gude, Karen <Gude.Karen@epa.gov>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Great. So...

Karen, 2:15 for National Tribal Water Council sounds fine

Rose, we should add these NTWC and NTC meetings to our tribal outreach "list" – and can you copy Carol on that?  
Thanks.



Kathy, I think almost anyone on the JD team(me, Donna, Rose) can handle substance questions – John and Mindy too. The issue is, there might not yet BE substance on some of the areas they are asking about...

---

**From:** Hurlid, Kathy  
**Sent:** Wednesday, June 07, 2017 9:09 AM  
**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Currently the 14<sup>th</sup> is a hold. I think you are good to do this call with the Tribal Council.  
I can do a general call if we need it on the 14<sup>th</sup>. However, WSWC wants another call but it needs to be with someone who knows the substance. They are looking at the 15<sup>th</sup> or 16<sup>th</sup> though.

---

**From:** Christensen, Damaris  
**Sent:** Wednesday, June 07, 2017 8:54 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Hurlid, Kathy <[Hurlid.Kathy@epa.gov](mailto:Hurlid.Kathy@epa.gov)>  
**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

My calendar says there is a state association meeting from 2-4 but I think it might just be a hold. Kathy, is the 6/14 association meeting happening? I know WSWC wants another call. ... So does the National Tribal Water Council.

Kathy, if there is a meeting, can you handle it with just you and maybe Julia or Dolores or Brittany? Maybe if we put me on the agenda early for the NTWC?

Damaris

---

**From:** Kwok, Rose  
**Sent:** Wednesday, June 07, 2017 8:45 AM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Cc:** Gude, Karen <[Gude.Karen@epa.gov](mailto:Gude.Karen@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** Re: WOTUS Updates for 6/14 NTWC Monthly Call

Oh that's right! How about Damaris?

Sent from my iPhone

On Jun 7, 2017, at 8:43 AM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hi Karen:

Thanks for the cc. Unfortunately, I'll be on a plane coming back from a presentation in Pittsburgh, otherwise I'd be delighted to sit in and answer NTWC's questions. Sorry.

Donna

---

**From:** Gude, Karen  
**Sent:** Wednesday, June 07, 2017 8:36 AM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>  
**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris

<Christensen.Damaris@epa.gov>

**Subject:** RE: WOTUS Updates for 6/14 NTWC Monthly Call

Rose,

Hi. I spoke to Ken Norton, the National Tribal Water Council chair, yesterday, and he indicated that he is currently working on the NTWC's draft consultation comments and had some substantive questions/wanted to be able to have more of a substantive conversation with the Council reps during next Wednesday's NTWC. Understanding that you will be out of the office at NCAI next Wed, and staffing is tight on WOTUS, I wanted to see if it might be possible to have someone from the WOTUS team on hand to answer potential questions from Council members on WOTUS. (Sorry for the change in course.)

I can be flexible on timing/agenda for the call. I don't anticipate it would be more than about 15-20 minutes of someone's time. Given that you are out of the office, I am cc'ing Donna and Damaris, for awareness.

Thank you,

Karen Gude  
Tribal Program Coordinator  
U.S. EPA/Office of Water  
Phone: (202) 564-0831

---

**From:** Gude, Karen  
**Sent:** Tuesday, June 06, 2017 10:37 AM  
**To:** Kwok, Rose <Kwok.Rose@epa.gov>  
**Subject:** WOTUS Updates for 6/14 NTWC Monthly Call

Hi Rose,

Just a reminder that next Wednesday, 6/14, from 2:00 – 3:30 PM EDT is the monthly NTWC call. I'm working through the draft agenda now (attached for reference), and plan to include an quick update on WOTUS consultation, with several other regulatory/consultation updates. The NTWC will be following the NCAI tribal listening session.

Given that you'll be at NCAI, I would be happy to update the Council on the latest consultation/outreach efforts and the latest with respect to the step 1 rulemaking, should an announcement have been made by then. If you would like to participate and/or to have someone from OWOW participate in the NTWC call to provide updates to the Council, please just let me know.

The one follow up on WOTUS from the last call related to **Deliberative Process / Ex. 5**

## **Deliberative Process / Ex. 5**

Thanks!  
Karen  
(202) 564-0831

---

**Subject:** National Tribal Water Council - EPA Monthly Call

**Location:** DCRoomEast2369B/DC-ICC-OW-IO; Call in: **Nonresponsive Conference Code/ Ex. 6**

**Start:** Wed 6/14/2017 2:00 PM  
**End:** Wed 6/14/2017 3:30 PM

**Recurrence:** Monthly  
**Recurrence Pattern:** the second Wednesday of every 1 month(s) from 2:00 PM to 3:30 PM

**Meeting Status:** Meeting organizer

**Organizer:** Gude, Karen  
**Required Attendees:** Russell, Sam; Williams, James; Hall, Beth; Lopez-Carbo, Maria; Buffo, Corey; Anderson, Danielle; Leutner, Fred; Ruge, Zoe; Bathersfield, Nizanna; Hudiburgh, Gary; Delehanty, Robyn; Stabenfeldt, Lynn; Chemerys, Ruth; Epting, Steve; Holdsworth, Susan; Shumway, Laura; Kutschenreuter, Kathleen; Christensen, Damaris; Soscia, Marylou; Gardner, Thomas; Binder, Jonathan; Jonesi, Fran; Pamela Blasdel; **Personal Email / Ex. 6** [michbolt@nc-chokeee.com](mailto:michbolt@nc-chokeee.com); [dan.kusnierz@penobscotnation.org](mailto:dan.kusnierz@penobscotnation.org); [rrickard@hetf.org](mailto:rrickard@hetf.org); [nancyschuldt@fdlrez.com](mailto:nancyschuldt@fdlrez.com); [memarthla@sctribe.com](mailto:memarthla@sctribe.com); Denise Jensen; [clarrick@utemountain.org](mailto:clarrick@utemountain.org); [emorrison-dia@gci.net](mailto:emorrison-dia@gci.net); **Personal Email / Ex. 6** [philc@cdatribe-nsn.gov](mailto:philc@cdatribe-nsn.gov); [slivermore@pci-nsn.gov](mailto:slivermore@pci-nsn.gov); [jamesh@nezperce.org](mailto:jamesh@nezperce.org); Temple, Leslie; Davis, CatherineM; Richardson, Matthew; Negash, Lily

**Optional Attendees:** Upton, Jennifer; Nasir, Iqra  
**Resources:** DCRoomEast2369B/DC-ICC-OW-IO

**Conference Number:** **Nonresponsive Conference Code/ Ex. 6**

**To:** Fontenot, Alison[Fontenot.Alison@epa.gov]; Downing, Donna[Downing.Donna@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]  
**From:** Christensen, Damaris  
**Sent:** Tue 6/13/2017 2:05:07 PM  
**Subject:** WOTUS TPs  
[WOTUS2 Talking Points 6-12-17.docx](#)  
[ATT00001.htm](#)

Here you go - these should work. Might want to drop the third bullet under step 2 for your audience.  
Damaris

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]  
**Sent:** Fri 7/7/2017 6:24:46 PM  
**Subject:** RE: WOTUS-2 materials responding to Ann's request  
Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx

Hi Mindy:

Attached please find a revised 2.5-pager on WOTUS-2 **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** inserted Jim K's additions to an earlier paper on the same topic,  
and decided to add **Deliberative Process / Ex. 5**

I'll stick my head in to see if you have any questions before disappearing off to lunch.

Donna

**From:** Eisenberg, Mindy  
**Sent:** Friday, July 07, 2017 2:18 PM  
**To:** Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS-2 materials responding to Ann's request

□

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna  
**Sent:** Friday, July 07, 2017 2:17 PM  
**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** RE: WOTUS-2 materials responding to Ann's request

Folded in both. Am tinkering with **Deliberative Process / Ex. 5** Should be ready in ten-ish minutes. (Although I am going to go get lunch one of these days... perhaps in eleven minutes?)

DMD

**From:** Eisenberg, Mindy  
**Sent:** Friday, July 07, 2017 2:16 PM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>  
**Subject:** RE: WOTUS-2 materials responding to Ann's request

Yes, this morning's. I was thinking more about **Deliberative Process / Ex. 5**

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 1:17 PM

**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Cc:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Thanks Damaris. I'll look and see what Jim had to say. I think Mindy's suggested edits are on the paper created this morning, but it can also benefit from Jim's insights on the earlier paper.

Donna

**From:** Christensen, Damaris

**Sent:** Friday, July 07, 2017 1:16 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Subject:** Re: WOTUS-2 materials responding to Ann's request

I'm still at lunch but I believe the WQS program made some suggested edits to this final version after it was used. Maybe forwarded by Jim Keating?

Sent from my iPhone

On Jul 7, 2017, at 1:04 PM, Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)> wrote:

Thanks very much! On the paper regarding **Deliberative Process / Ex. 5** can we add something about **Deliberative Process / Ex. 5** Also, in terms of **Deliberative Process / Ex. 5** can we caveat it that it will be **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 12:43 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris  
<[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** WOTUS-2 materials responding to Ann's request

Hi Mindy:

Ann asked for

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Items 1 and 2 are attached. Items for #3 include materials we prepared for the Administrator's briefing in late March, as well as other materials that might be useful. Note that the March briefing materials included a short summary of **Deliberative Process / Ex. 5**



## **Deliberative Process / Ex. 5**

Please let me know if you would like additional materials in response to Ann's request.  
Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Chemerys, Ruth[Chemerys.Ruth@epa.gov]; Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Hewitt, Julie[Hewitt.Julie@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/14/2017 2:43:21 PM  
**Subject:** Thinking additional resources for WOTUS-2 rulemaking: Donna's notes from our budget discussion this morning  
[Budget ests 1.docx](#)

Hi JD Teamsters and Julie:

Here are my notes from this morning's discussion of additional resources that could be helpful in the WOTUS-2 rulemaking. I haven't polished the notes, but thought they might be helpful as we continue to develop a resource request for Mindy to use in conversations with Lee F. and others. As I mentioned in our meeting, it would be good to have this ready for Mindy when she returns from travel next Wednesday.

I'm adding Julie H., so that she might think whether there are additional resources (either \$ or FTEs) that could be helpful on the economics effort. Julie?

Talk to you later!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Goodin, John[Goodin.John@epa.gov]  
**Cc:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]; Donna Downing[**Personal Email / Ex. 6**]  
**From:** Downing, Donna  
**Sent:** Tue 7/11/2017 11:05:23 PM  
**Subject:** Shorter table comparison of longstanding rule, CWR, and a bit of **Deliberative Process / Ex. 5**  
Options table TPs.docx  
Table comparing CWR to old rule to **Deliberative Process / Ex. 6** .docx

Found a shorter table and added a somewhat simplistic **Deliberative Process / Ex. 5** column. Please let me know if this is helpful.

Also attaching the TPs prepared for discussing the options table.

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 6:25:08 PM  
**Subject:** RE: WOTUS-2 materials responding to Ann's request  
Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx

Hi Mindy:

Attached please find a revised 2.5-pager on WOTUS-2 **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** inserted Jim K's additions to an earlier paper on the same topic,  
and decided to add **Deliberative Process / Ex. 5**.

I'll put this up on Sharepoint under "briefings."

I'll stick my head in to see if you have any questions before disappearing off to lunch.

Donna

**From:** Eisenberg, Mindy  
**Sent:** Friday, July 07, 2017 2:18 PM  
**To:** Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS-2 materials responding to Ann's request

□

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 2:17 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Christensen, Damaris  
<[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Folded in both. Am tinkering with Deliberative Process / Ex. 5 Should be ready in ten-ish minutes. (Although I am going to go get lunch one of these days... perhaps in eleven minutes?)

DMD

**From:** Eisenberg, Mindy

**Sent:** Friday, July 07, 2017 2:16 PM

**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris  
<[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Yes, this morning's. I was thinking more about Deliberative Process / Ex. 5

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 1:17 PM

**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Cc:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Thanks Damaris. I'll look and see what Jim had to say. I think Mindy's suggested edits are on the paper created this morning, but it can also benefit from Jim's insights on the earlier paper.

Donna

**From:** Christensen, Damaris

**Sent:** Friday, July 07, 2017 1:16 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Subject:** Re: WOTUS-2 materials responding to Ann's request

I'm still at lunch but I believe the WQS program made some suggested edits to this final version after it was used. Maybe forwarded by Jim Keating?

Sent from my iPhone

On Jul 7, 2017, at 1:04 PM, Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)> wrote:



Thanks very much! On the paper regarding **Deliberative Process / Ex. 5** can we add something about **Deliberative Process / Ex. 5**? Also, in terms of **Deliberative Process / Ex. 5** can we caveat it that it will be **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 12:43 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** WOTUS-2 materials responding to Ann's request

Hi Mindy:

Ann asked for **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Items 1 and 2 are attached. Items for #3 include materials we prepared for the Administrator's briefing in late March, as well as other materials that might be useful. Note that the March briefing materials included a short summary of **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Please let me know if you would like additional materials in response to Ann's request.  
Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004



**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 5:17:51 PM  
**Subject:** As requested: materials for Sara's calls to initiate early interagency engagement on WOTUS-2  
Early Inter-Agency Engagement Overview.docx  
TPs for political-level calls re early interagency engagement Draft v1.docx

Hi Mindy:

## Deliberative Process / Ex. 5

## Deliberative Process / Ex. 5

Please let me know if you have any questions or suggestions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 4:43:05 PM  
**Subject:** WOTUS-2 materials responding to Ann's request  
[Attachment 2 Options for Scalia test v1.docx](#)  
[Attachment 4 WOTUS2 Effects on Other Programs.docx](#)  
[Table for Options 3-8-2017 v4.docx](#)  
[Table WOTUS2 Step 2 options v2.docx](#)  
[wotus 2 Legal Considerations draft 3-17.docx](#)  
[WOTUS2 proposed plan 3-22-17 draft.docx](#)  
[Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx](#)  
[December 2008 Rapanos Guidance.pdf](#)

Hi Mindy:

**Deliberative Process / Ex. 5** <sup>8</sup>

**Deliberative Process / Ex. 5**

Please let me know if you would like additional materials in response to Ann's request. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov];  
McDavit, Michael W.[Mcdavit.Michael@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 3:52:15 PM  
**Subject:** RE: WOTUS  
Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx

Hi Mindy:

As requested, I'll pull together what's on Sharepoint and/or in emails from Steve (who is not a Sharepoint fan). I also have an electronic copy of the 2008 guidance. I'll put all I find that's responsive in an email to you before 1pm.

In the meantime, attached for your consideration is a 2-pager giving illustrations of Deliberative Process / Ex. 5  
Deliberative Process / Ex. 5 This is intended to respond to Lee's request for a succinct illustration of how

## Deliberative Process / Ex. 5

If you have time, you might check out the draft scenarios on Sharepoint. I think the attached 2-pager might be more useful for Lee at next week's meeting, but perhaps the additional details in the draft scenarios also could be useful. Here's a link to the scenario document:

## Nonresponsive Internal URL/ Ex. 6

I'm cc'ing Rose and Damaris in case they have suggested edits or other thoughts on the attached 2-pager.

Donna

**From:** Eisenberg, Mindy  
**Sent:** Friday, July 07, 2017 11:04 AM



**To:** Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** Fwd: WOTUS

Hey Donna,

Please see Ann's email to clarify what I mentioned yesterday.

Thanks!

Sent from my iPhone

Begin forwarded message:

**From:** "Campbell, Ann" <Campbell.Ann@epa.gov>  
**Date:** July 7, 2017 at 11:01:07 AM EDT  
**To:** "Eisenberg, Mindy" <Eisenberg.Mindy@epa.gov>  
**Cc:** "Connors, Sandra" <Connors.Sandra@epa.gov>  
**Subject:** WOTUS

Mindy, as I mentioned yesterday per my discussion with Lee and Mike, can I get copies of the early scoping papers that were prepared **Deliberative Process / Ex. 5** Though not fully fleshed out, I recall they laid out **Deliberative Process / Ex. 5** (maybe the Administrator's briefing paper too?). I recall that the program also prepared a briefing paper on **Deliberative Process / Ex. 5** Lee would appreciate receiving a copy of that as well. Lastly, if you could send the 2008 guidance, that would be great.

Sorry for the lengthy information collection request...just trying to facilitate Lee getting up to speed with information his counterparts already have.

Thanks much!

Ann

**To:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Chemerys, Ruth[Chemerys.Ruth@epa.gov]; Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]  
**From:** Downing, Donna  
**Sent:** Thur 7/6/2017 12:58:49 PM  
**Subject:** FW: WOTUS schedule  
WOTUS-2 Scheduling Options July 15 2017.docx

Here's the email Mindy sent forward, with our schedule. It's also on Sharepoint under the schedule subfolder.

Donna

**From:** Eisenberg, Mindy  
**Sent:** Wednesday, July 05, 2017 6:27 PM  
**To:** Shapiro, Mike <Shapiro.Mike@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>  
**Cc:** Goodin, John <Goodin.John@epa.gov>; Connors, Sandra <Connors.Sandra@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** WOTUS schedule

# Deliberative Process / Ex. 5

# Deliberative Process / Ex. 5

Please let me know if you have any questions or would like to discuss further.

Thanks,

Mindy

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Chemerys, Ruth[Chemerys.Ruth@epa.gov]; Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]  
**From:** Downing, Donna  
**Sent:** Thur 6/29/2017 7:04:25 PM  
**Subject:** RE: A request for the WOTUS-2 Informal Workgroup

Thanks, Mindy. That's very helpful and I'm not surprised at your preferences.

Rose, when you get a chance could you **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**

Donna

**From:** Eisenberg, Mindy  
**Sent:** Thursday, June 29, 2017 2:51 PM  
**To:** Downing, Donna <Downing.Donna@epa.gov>  
**Cc:** Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>; Schaefer-Gomez, Julia <Schaefer-Gomez.Julia@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>  
**Subject:** RE: A request for the WOTUS-2 Informal Workgroup

I'm fine with **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** Would like to talk more with Karen G and Andrew H about that.

As for the options paper, I would prefer **Deliberative Process / Ex. 5**.

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Thursday, June 29, 2017 2:34 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>; Chemerys, Ruth <[Chemerys.Ruth@epa.gov](mailto:Chemerys.Ruth@epa.gov)>; Schaefer-Gomez, Julia <[Schaefer-Gomez.Julia@epa.gov](mailto:Schaefer-Gomez.Julia@epa.gov)>; McDavit, Michael W. <[Mcdavit.Michael@epa.gov](mailto:Mcdavit.Michael@epa.gov)>

**Subject:** A request for the WOTUS-2 Informal Workgroup

Hi Mindy:

We had our biweekly WOTUS-2 informal regional workgroup meeting today. Among other things, Rose, Dolores, and Andrea reported out on tribal consultation and federalism. The workgroup was wondering if they could **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5** Rose indicated she could  
**Deliberative Process / Ex. 5**. Would that be OK with  
you? We've asked them **Deliberative Process / Ex. 5**.

A second request was whether **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5** The workgroup worked with us some in its  
development, by raising issues and implications. If it's OK by you, we **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**

Please let me know your druthers. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004

**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Chemerys, Ruth[Chemerys.Ruth@epa.gov]; Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; McDavit, Michael W.[Mcdavit.Michael@epa.gov]  
**From:** Downing, Donna  
**Sent:** Thur 6/29/2017 6:33:34 PM  
**Subject:** A request for the WOTUS-2 Informal Workgroup

Hi Mindy:

We had our biweekly WOTUS-2 informal regional workgroup meeting today. Among other things, Rose, Dolores, and Andrea reported out on tribal consultation and federalism. The workgroup was wondering if they could [redacted] **Deliberative Process / Ex. 5**

[redacted] **Deliberative Process / Ex. 5** Rose indicated she could  
[redacted] **Deliberative Process / Ex. 5** Would that be OK with  
you? We've asked them not to share if we do post them.

A second request was whether [redacted] **Deliberative Process / Ex. 5**  
[redacted] **Deliberative Process / Ex. 5** The workgroup worked with us some in its  
development, by raising issues and implications. If it's OK by you, we [redacted] **Deliberative Process / Ex. 5**  
[redacted] **Deliberative Process / Ex. 5**

Please let me know your druthers. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004



Message

**From:** Downing, Donna [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=D853E50D3A2B489DAF2CC498C052E3D6-DDOWNING]  
**Sent:** 6/28/2017 1:19:03 PM  
**To:** Hurlid, Kathy [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=2f3b04131f1145fcb4ccf5b0a64c1ac4-KHurlid]; Price, Myra [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c53568bb66704b10a1fddc426648bb48-MAPrice]; Armentrout, Ashleigh [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c2ca08c87d104079b576aa8a148434b0-Armentrout,]; Chemerys, Ruth [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=908be985d82a4e4a7888d13aedcec9d-Chemerys, Ruth]; Christensen, Damaris [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=e04107c23c1043d6967754064c477a29-Christensen, Damaris]; Kutschenreuter, Kathleen [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c77f7d227deb42beb550cb73331ec633-KKutsche]; Kwok, Rose [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d3d2987ba8f246a5a9e37773201fd180-Kwok, Rose]; McDavit, Michael W. [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4cb54848e7f641bf90e7cbbfedb28971-Michael W. McDavit]; Peragine, Hannah [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=0e18c2cbcc0e4f79879ae9a03b4cfddc-Peragine, H]; Dils, Rebecca [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=f1b2fd2cff4746b49274b30a4308b862-RDils]; Rossi, Ann [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=03339195c43e40c49e4a22f05a0c9669-Rossi, Anne]; Schaefer-Gomez, Julia [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=d5f0868369304bef91d8aece8386fc8c-Schaefer-Go]; Wesson, Dolores [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=500270d34ba046f48c5d8ff54746cb81-Wesson, Dol]  
**Subject:** RE: Items RE: branch meeting tomorrow

BTW, as to item 1), yesterday's Step 1 action didn't repeal the Clean Water Rule, but was a proposal to repeal that's subject to public notice-and-notice comment. The press made the same mistake a couple of times.

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

**From:** Hurlid, Kathy  
**Sent:** Wednesday, June 28, 2017 9:01 AM  
**To:** Price, Myra <Price.Myra@epa.gov>; Armentrout, Ashleigh <Armentrout.Ashleigh@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Kutschenreuter, Kathleen <Kutschenreuter.Kathleen@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Peragine, Hannah <peragine.hannah@epa.gov>; Dils, Rebecca <Dils.Rebecca@epa.gov>; Rossi, Ann <Rossi.Ann@epa.gov>; Schaefer-Gomez, Julia <Schaefer-Gomez.Julia@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>  
**Subject:** Items RE: branch meeting tomorrow

Thinking that this will be cancelled per Myra's e-mail below. Here are a few items from OWCD mgr meeting yesterday. (Larry goofed and thought I was acting)

- 1) As you saw WOTUS phase 1 was signed yesterday. This repeals the 2015 rule and puts in place the 1988 rule with the Rapanos guidance (basically what we had prior to the 2015 rule)
- 2) Senate appropriations hearing was held yesterday.
- 3) Folks are responding to the QFRs from the House on the appropriations – if you received a request to respond from an OWOW manager, responses are due today (Wednesday) by 3pm. They need to go up through

Deliberative Process / Ex. 5

## Deliberative Process / Ex. 5

- 4) **REMEMBER** to take the training for the travel card.
- 5) Bernice has sent out a request for names of scientists and scientific organizations we could potentially partner with to accomplish or keep our work moving forward. This list is being compiled in case ORD is focused on other activities or zeroed out. It is also for John's info.
- 6) There will be an ORISE/Mentor meeting scheduled sometime this summer.
- 7) We need to send to Larry a list of all meetings our branch regularly holds with the regions. Please provide: a title, identify with whom you are meeting (e.g., managers, staff), date & time you meet. The title should be descriptive enough that one could figure out the purpose of the call. They did not ask for it, but include the staff lead. Rebecca, they have the monthly ESTP calls, thanks for doing this. I will submit the following:

a.

## Deliberative Process / Ex. 5

- Happy Wednesday everyone,  
Kathy

**From:** Price, Myra

**Sent:** Tuesday, June 27, 2017 8:26 PM

**To:** Armentrout, Ashleigh <Armentrout.Ashleigh@epa.gov>; Chemerys, Ruth <Chemerys.Ruth@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Kutschenreuter, Kathleen <Kutschenreuter.Kathleen@epa.gov>; Hurl, Kathy <Hurl.Kathy@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>; Peragine, Hannah <peragine.hannah@epa.gov>; Dils, Rebecca <Dils.Rebecca@epa.gov>; Rossi, Ann <Rossi.Ann@epa.gov>; Schaefer-Gomez, Julia <Schaefer-Gomez.Julia@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>

**Subject:** branch meeting tomorrow

Unless I hear from anyone that we should have a branch meeting tomorrow I think we can cancel it after the excellent OWCD all-hands meeting we had today. Once again, lots of appreciation for all the hard work everyone put in on the rule and we should

## Deliberative Process / Ex. 5

Myra

..><(((°>..><(((°>..><(((°>..><(((°>  
•><(((°>•><(((°>•><(((°>•><(((°>  
.,><(((°>.,><(((°>.,><(((°>.,><(((°>

(\*V\*)

(( ))

--" "--

Myra Price

U.S. EPA

Office of Wetlands, Oceans and Watersheds

Oceans, Wetlands and Communities Division

Tel: 202-566-1225

Mailing Address:

1200 Pennsylvania Ave., NW (MC: 4502T)

Washington, DC 20460

Delivery Address:

1301 Constitution Ave, NW

Room 7410  
Washington, DC 20004

**To:** Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Chemerys, Ruth[Chemerys.Ruth@epa.gov]; Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]  
**From:** Downing, Donna  
**Sent:** Tue 6/27/2017 8:11:12 PM  
**Subject:** FW: Signed WOTUS Step 1 Rule  
[WOTUS STEP1.pdf](#)

## Deliberative Process / Ex. 5

Donna

-----Original Message-----

From: Threet, Derek

Sent: Tuesday, June 27, 2017 2:58 PM

To: Bowman, Liz <Bowman.Liz@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Grantham, Nancy <Grantham.Nancy@epa.gov>

Cc: Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>

Subject: Signed WOTUS Step 1 Rule

## Deliberative Process / Ex. 5

-----Original Message-----

From: Bowman, Liz

Sent: Tuesday, June 27, 2017 2:24 PM

To: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>

Cc: Cindy Barger <cindy.s.barger.civ@mail.mil>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>;

Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris

<Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek

<Threet.Derek@epa.gov>

Subject: RE: WOTUS2 I'm in W7129

## Deliberative Process / Ex. 5

## Deliberative Process / Ex. 5

-----Original Message-----

From: Drinkard, Andrea

Sent: Tuesday, June 27, 2017 1:54 PM

To: Bowman, Liz <Bowman.Liz@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>

Cc: Cindy Barger <cindy.s.barger.civ@mail.mil>; Evalenko, Sandy <Evalenko.Sandy@epa.gov>;

Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Christensen, Damaris

<Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Threet, Derek

<Threet.Derek@epa.gov>

Subject: RE: WOTUS2 I'm in W7129

## Deliberative Process / Ex. 5

-----Original Message-----

From: Bowman, Liz

Sent: Tuesday, June 27, 2017 1:48 PM

To: Kwok, Rose <Kwok.Rose@epa.gov>

Cc: Drinkard, Andrea <Drinkard.Andrea@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>;

Evalenko, Sandy <Evalenko.Sandy@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>;

Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>;

Threet, Derek <Threet.Derek@epa.gov>

Subject: Re: WOTUS2 I'm in W7129

## Deliberative Process / Ex. 5

Sent from my iPhone

> On Jun 27, 2017, at 1:26 PM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

>

## Deliberative Process / Ex. 5

> -----Original Message-----

> From: Drinkard, Andrea

> Sent: Tuesday, June 27, 2017 1:24 PM

> To: Bowman, Liz <Bowman.Liz@epa.gov>; Cindy Barger <cindy.s.barger.civ@mail.mil>

> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>;

Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>;

Threet, Derek <Threet.Derek@epa.gov>

> Subject: RE: WOTUS2 I'm in W7129

> Importance: High

>

## Deliberative Process / Ex. 5

> Thanks.

>

>

> -----Original Message-----

> From: Bowman, Liz

> Sent: Tuesday, June 27, 2017 1:09 PM

> To: Cindy Barger <cindy.s.barger.civ@mail.mil>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>

> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>;

Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>

> Subject: RE: WOTUS2 I'm in W7129

>

## Deliberative Process / Ex. 5

> -----Original Message-----

> From: Barger, Cindy S CIV USARMY HQDA ASA CW (US) [mailto:cindy.s.barger.civ@mail.mil]

> Sent: Tuesday, June 27, 2017 1:06 PM  
> To: Bowman, Liz <Bowman.Liz@epa.gov>; Drinkard, Andrea <Drinkard.Andrea@epa.gov>  
> Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>;  
Christensen, Damaris <Christensen.Damaris@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>  
> Subject: WOTUS2 I'm in W7129  
>

# Deliberative Process / Ex. 5

> Thanks. Cindy  
>  
> Sent from my iPhone

**To:** Kwok, Rose[Kwok.Rose@epa.gov]  
**Cc:** Jensen, Stacey M CIV USARMY HQDA (US)[Stacey.M.Jensen@usace.army.mil];  
Christensen, Damaris[Christensen.Damaris@epa.gov]; Cindy Barger[cindy.s.barger.civ@mail.mil];

**Personal Email / Ex. 6**

**From:** Downing, Donna  
**Sent:** Tue 6/20/2017 12:22:12 AM  
**Subject:** Re: scenarios

Did we set a meeting time/date? My handheld is having trouble receiving messages, so I thought I'd ask and cc my home email also. Just in case the meeting is today while I'm out of the office...

Donna

Sent from my iPhone

On Jun 16, 2017, at 6:25 PM, Kwok, Rose <Kwok.Rose@epa.gov> wrote:

Hi Stacey,

# Deliberative Process / Ex. 5

**From:** Christensen, Damaris  
**Sent:** Friday, June 16, 2017 4:18 PM  
**To:** Kwok, Rose <Kwok.Rose@epa.gov>  
**Subject:** scenarios

Hey Rose,

# **Deliberative Process / Ex. 5**



# **Deliberative Process / Ex. 5**

Anyway, thought we should touch base to discuss and figure out next steps.

**From:** Downing, Donna  
**To:** Christensen, Damaris  
**Sent:** 6/16/2017 2:22:17 PM  
**Subject:** RE: staff asks

I think it's a great idea to ask Julia to

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5** I'll be interested in what she finds. It'll also help get Julia up to speed on WOTUS issues. Do you have an hours estimate for what the task might require? I'm curious, and I'm pretty sure Mike M. will ask.

I also understand Diane (last name??) is really good and so could probably reliably handle uploading comments from email. As with Julia, Mike M. and Diane's supervisor likely would want to know the approximate hours.

Donna

**From:** Christensen, Damaris  
**Sent:** Friday, June 16, 2017 10:18 AM  
**To:** Downing, Donna  
**Subject:** FW: staff asks

Sending again since I sent at COB yesterday. I need to track down the directory and figure out Diane's name though

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 5:01 PM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Subject:** Re: staff asks

Let's see how that works.

So, 1. Depending on Karyn's response to my email, Julia for going thru

**Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

2. Using Diane (?) to upload comments from email? (See below)

Sent from my iPhone

On Jun 15, 2017, at 4:57 PM, Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)> wrote:

Hmmm. How about you suggest in an email to me what you'd like to ask, then I'll reply to you "sounds fine!" at which time you can email Mike directly and indicate you've talked with me and I've concluded it fits into the broader plan for the WOTUS effort. That way we sound (and are) coordinated but we're not creating a hierarchy that could in some circumstances get in the way. What do you think?

BTW, the meeting with the Springfield IL mayor raised no WOTUS issues. Lasted 45 minutes on air issues (no air people there), effluent guidelines (no ELG people there) and state revolving loan fund (was a person from the SRF there!).

Donna

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:44 PM  
**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>  
**Subject:** staff asks

Hey Donna,

If I want to ask Mike (or ask Mike to ask someone) for staff time on particular comms related projects, how do you want me to go about doing it? I guess my inclination is to write Mike and copy you, but if you think it makes sense for me to pass to you to pass to Mike I'm ok with that too.

I'm thinking of it in relationship to, say, the ask for Eric's time (while you were out on vacation), or asking Mike to ask Mindy to get the new SEE (Diane?) to help us upload comments from the cwawotus email to the Sharepoint site.

Damaris

**From:** Downing, Donna  
**To:** Kwok, Rose; Christensen, Damaris; Wendelowski, Karyn  
**CC:** Wesson, Dolores  
**Sent:** 6/15/2017 9:02:22 PM  
**Subject:** RE: 101(b) and cooperative federalism

All good!

**From:** Kwok, Rose  
**Sent:** Thursday, June 15, 2017 5:01 PM  
**To:** Downing, Donna ; Christensen, Damaris ; Wendelowski, Karyn  
**Cc:** Wesson, Dolores  
**Subject:** RE: 101(b) and cooperative federalism

Yep – Damaris had suggested these terms below:

**Deliberative Process / Ex. 5**

**From:** Downing, Donna  
**Sent:** Thursday, June 15, 2017 4:59 PM  
**To:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: 101(b) and cooperative federalism

Also: **Deliberative Process / Ex. 5**

Donna

**From:** Kwok, Rose  
**Sent:** Thursday, June 15, 2017 4:40 PM  
**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: 101(b) and cooperative federalism

I think: **Deliberative Process / Ex. 5**

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:31 PM  
**To:** Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** 101(b) and cooperative federalism

Hey, Karyn.

I talked with Rose this afternoon and have been working to follow up by: **Deliberative Process / Ex. 5**

# Deliberative Process / Ex. 5

# **Deliberative Process / Ex. 5**

# **Deliberative Process / Ex. 5**

# **Deliberative Process / Ex. 5**

**From:** Downing, Donna  
**To:** Kwok, Rose; Christensen, Damaris; Wendelowski, Karyn  
**CC:** Wesson, Dolores  
**Sent:** 6/15/2017 8:59:23 PM  
**Subject:** RE: 101(b) and cooperative federalism

Also: **Deliberative Process / Ex. 5**

Donna

**From:** Kwok, Rose  
**Sent:** Thursday, June 15, 2017 4:40 PM  
**To:** Christensen, Damaris ; Wendelowski, Karyn  
**Cc:** Downing, Donna ; Wesson, Dolores  
**Subject:** RE: 101(b) and cooperative federalism

I think **Deliberative Process / Ex. 5**

**From:** Christensen, Damaris  
**Sent:** Thursday, June 15, 2017 4:31 PM  
**To:** Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** 101(b) and cooperative federalism

Hey, Karyn.

I talked with Rose this afternoon and have been working to follow **Deliberative Process / Ex. 5**

# Deliberative Process / Ex. 5



# **Deliberative Process / Ex. 5**

# **Deliberative Process / Ex. 5**

---

**From:** Downing, Donna  
**To:** Rose Kwok; Christensen, Damaris  
**Sent:** 6/15/2017 3:21:27 PM  
**Subject:** FW: edits to new text in preamble  
**Attachments:** clean version june 14.docx

Huh, Steve says he's learned his lesson and "attorneys [should] be the ones to ensure version control." My impression is that most of our version control issues involve attorneys uploading or working on versions other than the Sharepoint documents, creating a version control problem. Is my impression wrong??

donna

**From:** Neugeboren, Steven  
**Sent:** Thursday, June 15, 2017 10:54 AM  
**To:** Eisenberg, Mindy ; Kupchan, Simma  
**Cc:** Shapiro, Mike ; Goodin, John ; Peck, Gregory ; Downing, Donna ; Kwok, Rose ; Christensen, Damaris ; McDavit, Michael W. ; Wehling, Carrie ; Wendelowski, Karyn  
**Subject:** RE: edits to new text in preamble

I want to make sure that these edits are on the draft I sent last night – which I have reattached as a clean version. Lesson learned I should let the attorneys be the ones to ensure version control.

Steven Neugeboren  
Associate General Counsel  
Water Law Office  
Environmental Protection Agency  
202-564-5488

**From:** Eisenberg, Mindy  
**Sent:** Thursday, June 15, 2017 10:29 AM  
**To:** Kupchan, Simma <[Kupchan.Simma@epa.gov](mailto:Kupchan.Simma@epa.gov)>  
**Cc:** Neugeboren, Steven <[Neugeboren.Steven@epa.gov](mailto:Neugeboren.Steven@epa.gov)>; Shapiro, Mike <[Shapiro.Mike@epa.gov](mailto:Shapiro.Mike@epa.gov)>; Goodin, John <[Goodin.John@epa.gov](mailto:Goodin.John@epa.gov)>; Peck, Gregory <[Peck.Gregory@epa.gov](mailto:Peck.Gregory@epa.gov)>; Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>; McDavit, Michael W. <[Mcdavit.Michael@epa.gov](mailto:Mcdavit.Michael@epa.gov)>; Wehling, Carrie <[Wehling.Carrie@epa.gov](mailto:Wehling.Carrie@epa.gov)>; Wendelowski, Karyn <[wendelowski.karyn@epa.gov](mailto:wendelowski.karyn@epa.gov)>  
**Subject:** edits to new text in preamble

Hi Simma,  
Here are a few edits from OWOW on the new text. Let me know when you are done with all of the edits and I can drop it into a clean version of the preamble that includes new language for **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5** I'm also wondering if we need further edits to address DOJ's concerns from Tuesday.

Thanks,  
Mindy

Mindy Eisenberg  
Acting Director, Oceans, Wetlands & Communities Division  
Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW, mailcode 4502T  
Washington, DC 20460  
(202) 566-1290



**DEPARTMENT OF DEFENSE**

**Department of the Army, Corps of Engineers**

**33 CFR Part 328**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401**

**[EPA-HQ-OW-2017-0203; FRL-9962-34-OW]**

**RIN 2040-AF74**

**Definition of “Waters of the United States” – Recodification of Pre-existing Rules**

**AGENCIES:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency and the Department of the Army (“the agencies”) are publishing this proposed rule to initiate the first step in a comprehensive, two-step process intended to review and revise the definition of “waters of the United States” consistent with the Executive Order signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule.” This first step proposes to rescind the definition of “waters of the United States” in the Code of Federal

Regulations to re-codify the definition of “waters of the United States,” which currently governs administration of the Clean Water Act, pursuant to a decision issued by the U.S. Court of Appeals for the Sixth Circuit staying a definition of “waters of the United States” promulgated by the agencies in 2015. The agencies would apply the definition of “waters of the United States” as it is currently being implemented, that is informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding practice. Proposing to re-codify the regulations that existed before the 2015 Clean Water Rule will provide continuity and certainty for regulated entities, the States, agency staff, and the public. In a second step, the agencies will pursue notice-and-comment rulemaking in which the agencies will conduct a substantive re-evaluation of the definition of “waters of the United States.”

**DATES:** Comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2017-0203, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The agencies may publish any comment received to the public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The agencies will generally not consider comments or comment contents located outside of the primary submission (i.e. on the

web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION, CONTACT:** Ms. Donna Downing, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: (202) 566-2428; e-mail address: [CWAwotus@epa.gov](mailto:CWAwotus@epa.gov); or Ms. Stacey Jensen, Regulatory Community of Practice (CECW-CO-R), U.S. Army Corps of Engineers, 441 G Street, NW, Washington, DC 20314; telephone number: (202) 761-5903; e-mail address: [USACE\\_CWA\\_Rule@usace.army.mil](mailto:USACE_CWA_Rule@usace.army.mil).

**SUPPLEMENTARY INFORMATION:**

The regulatory definition of “waters of the United States” in this proposed rule is the same as the definition that existed prior to promulgation of the Clean Water Rule in 2015 and that has been in effect nationwide since the Clean Water Rule was stayed on October 9, 2016. The agencies will administer the regulations as they are currently being implemented consistent with Supreme Court decisions and longstanding practice as informed by applicable agency guidance documents.

State, tribal, and local governments have well-defined and longstanding relationships with the federal government in implementing CWA programs and these relationships are not altered by the proposed rule. This proposed rule will not establish any new regulatory requirements. Rather, the rule simply codifies the current legal *status quo* while the agencies

engage in a second, substantive rulemaking to reconsider the definition of “waters of the United States.”

## **I. Executive Summary**

### *A. What this proposed rule does*

In this proposed rule, the agencies define the scope of “waters of the United States” that are protected under the Clean Water Act (CWA). In 2015, the agencies published the “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015), and on October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. The agencies propose to replace the stayed 2015 definition of “waters of the United States”, and re-codify the exact same regulatory text that existed prior to the 2015 rule, which reflects the current legal regime under which the agencies are operating pursuant to the Sixth Circuit’s October 9, 2015 order. The proposed regulatory text would thus replace the stayed rulemaking text, and re-codify the regulatory definitions (at 33 CFR 328 and 40 CFR Parts 110; 112; 116; 117; 122; 230; 232; 300; 302; and 401) in the Code of Federal Regulations (CFR) as they existed prior to the promulgation of the stayed 2015 definition. If this proposed rule is finalized, the agencies would continue to implement those prior regulatory definitions), informed by applicable agency guidance documents and consistent with Supreme Court decisions and longstanding agency practice.

### *B. History and the purpose of this rulemaking*

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (“Clean Water Act” or “CWA” or “Act”) “to restore and maintain the chemical, physical and



biological integrity of the Nation's waters." Section 101(a). A primary tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, to "navigable waters" except in accordance with the Act. Section 301(a). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." Section 502(7).

The CWA also provides that States retain their traditional role in preventing, reducing and eliminating pollution. The Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources..." Section 101(b). States and Tribes voluntarily may assume responsibility for permit programs governing discharges of pollution under section 402 for any jurisdictional water bodies (section 402(b)), or of dredged or fill material discharges under section 404 (section 404(g)), with agency approval. (Section 404(g) provides that states may not assume permitting authority over certain specified waters and their adjacent wetlands.) States are also free to establish their own programs under state law to manage and protect waters and wetlands independent of the federal CWA. The statute's introductory purpose section thus commands the Environmental Protection Agency (EPA) to pursue two policy goals simultaneously: (a) to restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution.

The regulations defining the scope of federal CWA jurisdiction currently in effect, which today's proposed rule would recodify, were established in large part in 1977 (42 FR 37122, July 19, 1977). While EPA administers most provisions in the CWA, the U.S. Army Corps of Engineers (Corps) administers the permitting program under section 404. During the 1980s, both

of these agencies adopted substantially similar definitions (51 FR 41206, Nov. 13, 1986, amending 33 CFR 328.3; 53 FR 20764, June 6, 1988, amending 40 CFR 232.2).

Federal courts have reviewed the definition of “waters of the United States” and its application to a variety of factual circumstances. Three Supreme Court decisions, in particular, provide critical context and guidance in determining the appropriate scope of “waters of the United States.”

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), the Court, in a unanimous opinion, deferred to the Corps’ ecological judgment that adjacent wetlands are “inseparably bound up” with the waters to which they are adjacent, and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” *Id.* at 134.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Supreme Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA. The *SWANCC* decision created uncertainty with regard to the jurisdiction of other isolated non-navigable waters and wetlands. In January 2003, EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC* (“the 2003 Guidance”). The guidance indicated that *SWANCC* focused on isolated, intrastate, non-navigable waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations which asserted jurisdiction for waters under 33 CFR 328.3(a)(3)(i-iii). Waters that were jurisdictional pursuant to 33 CFR 328.3(a)(3) could no longer be determined jurisdictional based solely on their use by migratory birds.

Five years after the *SWANCC* decision, in *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*), a four-Justice plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term “waters of the United States” as covering “relatively permanent, standing or continuously flowing bodies of water . . .,” *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a “continuous surface connection . . .” to such water bodies, *id.* (Scalia, J., plurality opinion). The *Rapanos* plurality noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months....” *Id.* at 732 n.5 (emphasis in original). Justice Kennedy concurred with the plurality judgment, but concluded that the appropriate test for the scope of jurisdictional waters is whether a water or wetland possesses a “‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.” *Id.* at 759. The four dissenting Justices in *Rapanos*, who would have affirmed the court of appeals’ application of the agencies’ regulations, also concluded that the term “waters of the United States” encompasses, *inter alia*, all tributaries and wetlands that satisfy “either the plurality’s [standard] or Justice Kennedy’s.” *Id.* at 810 & n.14 (Stevens, J., dissenting).

While the *SWANCC* and *Rapanos* decisions limited the way the agencies’ longstanding regulatory definition of “waters of the United States” was implemented, in neither case did the Court invalidate that definition.

After the *Rapanos* decision, the agencies issued joint guidance in 2007 to address the waters at issue in that decision but did not change the codified definition. The guidance indicated that “waters of the United States” included traditional navigable waters and their

adjacent wetlands, relatively permanent waters and wetlands that abut them, and waters with a significant nexus to a traditional navigable water. The guidance did not address waters not at issue in *Rapanos*, such as interstate waters and the territorial seas. The guidance was reissued in 2008 with minor changes (hereinafter, the “2008 guidance”).<sup>1</sup>

After issuance of the 2008 guidance, Members of Congress, developers, farmers, state and local governments, environmental organizations, energy companies and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty on the scope of the waters protected by the CWA.

Following public notice and comment on a proposed rule, the agencies published a final rule defining the scope of “waters of the United States” on June 29, 2015 (80 FR 37054). Thirty-one States and a number of other parties sought judicial review in multiple actions in Federal district courts and Circuit Courts of Appeal, raising concerns about the scope and legal authority of the 2015 rule. One district court issued an order granting a motion for preliminary injunction on the rule’s effective date, finding that the thirteen State challengers were likely to succeed on their claims, including that the rule violated the congressional grant of authority to the agencies under the CWA and that it appeared likely the EPA failed to comply with Administrative Procedure Act (APA) requirements in promulgating the rule. *State of North Dakota et al. v. US EPA*, No. 15-00059, slip op. at 1-2 (D.N.D. Aug. 27, 2015, as clarified by order issued on September 4, 2015). Several weeks later, the Sixth Circuit stayed the 2015 rule nationwide to restore the “pre-Rule regime, pending judicial review.” *In re U.S. Dep’t. of Def. and U.S. Envtl.*

---

<sup>1</sup> The guidance expressly stated that it was not intended to create any legally binding requirements, and that “interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.” 2008 guidance at 4 n. 17.

*Protection Agency Final Rule: Clean Water Rule*, No. 15-3751 (lead), slip op. at 6. The Sixth Circuit found that the petitioners had demonstrated a substantial possibility of success on the merits, including with regard to claims that certain provisions of the rule were at odds with the *Rapanos* decision and that the distance limitations in the rule were not substantiated by scientific support. Pursuant to the court's order, the agencies have implemented the statute pursuant to the regulatory regime that preceded the 2015 rule. On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the court of appeals has original jurisdiction to review challenges to the 2015 rule. The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction.

On February 28, 2017, the President of the United States issued an Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule." Section 1 of the Order states, "[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution." It directs the EPA and the Army to review the 2015 rule for consistency with the policy outlined in section 1, and to issue a proposed rule rescinding or revising the 2015 rule as appropriate and consistent with law. Section 2. The Executive Order also directs the agencies to consider interpreting the term "navigable waters" in a manner consistent with Justice Scalia's plurality opinion in *Rapanos*. Section 3.

The agencies have the authority to rescind and revise the regulatory definition of "waters of the United States," consistent with the guidance in the Executive Order, so long as the revised

definition is authorized under the law and based on a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“*Fox*”). Importantly, such a revised decision need not be based upon a change of facts or circumstances. A revised rulemaking based “on a re-evaluation of which policy would be better in light of the facts” is “well within an agency’s discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal” of its regulations and programs. *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 & 1043 (D.C. Cir. 2012) (citing *Fox*, 556 U.S. at 514-15 (Rehnquist, J., concurring in part and dissenting in part)).

The Executive Order states that it is in the national interest to protect the nation’s waters from pollution as well as to allow for economic growth, ensuring regulatory clarity, and providing due deference to States, as well as Congress. Executive Order section 1. These various priorities reflect, in part the CWA itself, which includes both the objective to “restore and maintain” the integrity of the nation’s waters, as well as the policy to “recognize, preserve, and protect the primary responsibilities and right of States to prevent, reduce, and eliminate pollution...” CWA sections 101(a), 101(b). Re-evaluating the best means of balancing these statutory priorities, as called for in the Executive Order, is well within the scope of authority that Congress has delegated to the agencies under the CWA.

This rulemaking is the first step in a two-step response to the Executive Order, intended to ensure certainty as to the scope of CWA jurisdiction on an interim basis as the agencies proceed to engage in the second step: a substantive review of the appropriate scope of “waters of the United States.”

### *C. Today's proposed rule*

In this proposed rule, the agencies would rescind the 2015 Clean Water Rule and replace it with a recodification of the regulatory text that governed the legal regime prior to the 2015 Clean Water Rule and that the agencies are currently implementing under the court stay, informed by applicable guidance documents (e.g., the 2003 and 2008 guidance documents, as well as relevant memoranda and regulatory guidance letters), and consistent with the *SWANCC* and *Rapanos* Supreme Court decisions, applicable case law, and longstanding agency practice. The proposal retains exclusions from the definition of “waters of the United States” for prior converted cropland and waste treatment systems, both of which existed before the 2015 regulations were issued. Nothing in this proposed rule restricts the ability of States to protect waters within their boundaries by defining the scope of waters regulated under State law more broadly than the federal law definition.

### *D. Rationale for this rulemaking*

This rulemaking action is consistent with the February 28, 2017, Executive Order and the Clean Water Act. This action will consist of two steps. In this first step, the agencies are proposing as an interim action to repeal the 2015 definition of “waters of the United States” and codify the legal *status quo* that is being implemented now under the Sixth Circuit stay of the 2015 definition of “waters of the United States” and that was in place for decades prior to the 2015 rule. This regulatory text would, pending completion of the second step in the two-step process, continue to be informed by the 2003 and 2008 guidance documents. In the second step, the agencies will conduct a separate notice and comment rulemaking that will consider

developing a new definition of “waters of the United States” taking into consideration the principles that Justice Scalia outlined in the *Rapanos* plurality opinion.

In the 2015 rulemaking, the agencies described their task as “interpret[ing] the scope of the ‘waters of the United States’ for the CWA in light of the goals, objectives, and policies of the statute, the Supreme Court case law, the relevant and available science, and the agencies’ technical expertise and experience.” 80 Fed. Reg. 37,054, 37,060 (June 29, 2015). In so doing, the agencies properly acknowledged that a regulation defining “waters of the United States” in this area is not driven by any one type or piece of information, but rather must be the product of the evaluation and balancing of a variety of different types of information. That information includes scientific data as well as the policies articulated by Congress when it passed the Act. For example, the agencies recognized this construct in the preamble to the 2015 Rule by explaining that what constitutes a “significant nexus” to navigable waters “is not a purely scientific determination” and that “science does not provide bright line boundaries with respect to where ‘water ends’ for purposes of the CWA.” 80 Fed. Reg. at 37,060.<sup>2</sup>

The objectives, goals, and policies of the statute are detailed in sections 101(a)-(g) of the statute, and guide the agencies’ interpretation and application of the Clean Water Act. Section 101(a) of the Act states that the “objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and identifies several goals and national policies Congress believed would help the Act achieve that objective. 33 U.S.C.

---

<sup>2</sup> This notion was at least implicitly recognized by the Chief Justice in his concurring opinion in *Rapanos*: “[T]he Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.” *Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, C.J., concurring). Ultimately, developing “some notion of an outer bound” from the full range of relevant information is the task facing the agencies.



§ 1251(a). When referring to the Act's objective, the 2015 rule referred specifically to Section 101(a). 80 Fed. Reg. at 37,056.

In addition to the objective of the Act and the goals and policies identified to help achieve that objective in section 101(a), in section 101(b) Congress articulated that it is "the policy of the Congress" to:

[R]ecognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title.

33 U.S.C. § 1251(b). Therefore, as part of the two-step rulemaking, the agencies will be considering the relationship of the CWA objective and policies, and in particular, the meaning and importance of section 101(b).

The 2015 rule did acknowledge the language contained in section 101(b) and the vital role states and tribes play in the implementation of the Act and the effort to meet the Act's stated objective. *See, e.g.*, 80 Fed. Reg. at 37,059. In discussing the provision, the agencies noted that it was "[o]f particular importance[,] [that] states and tribes may be authorized by the EPA to administer the permitting programs of CWA sections 402 and 404." *Id.* The agencies also noted that "States and federally-recognized tribes, consistent with the CWA, retain full authority to implement their own programs to more broadly and more fully protect the waters in *their jurisdiction.*" *Id.* at 37,060. However, the agencies did not include a discussion in the 2015 rule preamble of the meaning and importance of section 101(b) in guiding the choices the agencies make in setting the outer bounds of jurisdiction of the Act, despite the recognition that the rule must be drafted "in light of the goals, objectives, and policies of the statute." In the two-step rulemaking process commencing with today's notice, the agencies will more fully consider the



policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states or tribes have protected or may protect waters that are not subject to CWA jurisdiction.

The scope of CWA jurisdiction is an issue of great national importance and therefore the agencies will allow for robust deliberations on the ultimate regulation. While engaging in such deliberations, however, the agencies recognize the need to provide as an interim step for regulatory continuity and clarity for the many stakeholders affected by the definition of “waters of the United States.” The pre-CWR regulatory regime is in effect as a result of the Sixth Circuit’s stay of the 2015 rule but that regime depends upon the pendency of the Sixth Circuit’s order and could be altered at any time by factors beyond the control of the agencies. The Supreme Court’s resolution of the question as to which courts have original jurisdiction over challenges to the 2015 rule could impact the Sixth Circuit’s exercise of jurisdiction and its stay. If, for example, the Supreme Court were to decide that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule, the Sixth Circuit case would be dismissed and its nationwide stay would expire, leading to inconsistencies, uncertainty, and confusion as to the regulatory regime that would be in effect pending substantive rulemaking under the Executive Order.

As noted previously, prior to the Sixth Circuit’s stay order, the District Court for North Dakota had preliminarily enjoined the rule in 13 States (North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming and New Mexico). Therefore, if the Sixth Circuit’s nationwide stay were to expire, the 2015 rule would be enjoined under the North Dakota order in States covering a large geographic area of the

country, but the rule would be in effect in the rest of the country pending further judicial decision-making or substantive rulemaking under the Executive Order.

Adding to the confusion that could be caused if the Sixth Circuit's nationwide stay of the 2015 rule were to expire, there are multiple other district court cases pending on the 2015 rule, including several where challengers have filed motions for preliminary injunctions. These cases – and the pending preliminary injunction motions – would likely be reactivated if the Supreme Court were to determine that the Sixth Circuit lacks original jurisdiction over challenges to the 2015 rule. The proposed interim rule would establish a clear regulatory framework that would avoid the inconsistencies, uncertainty and confusion that would result from a Supreme Court ruling affecting the Sixth Circuit's jurisdiction while the agencies reconsider the 2015 rule. It would ensure that, during this interim period, the scope of CWA jurisdiction will be administered exactly the way it is now, and as it was for many years prior to the promulgation of the 2015 rule. The agencies considered other approaches to providing stability while they work to finalize the revised definition, such as simply withdrawing or staying the Clean Water Rule, but did not identify any options that would do so more effectively and efficiently than this proposed rule would do. A stable regulatory foundation for the *status quo* would facilitate the agencies' considered re-evaluation, as appropriate, of the definition of "waters of the United States" that best effectuates the language, structure, and purposes of the Clean Water Act.

## **II. General Information**

### *A. How can I get copies of this document and related information?*

1. *Docket.* An official public docket for this action has been established under Docket Id. No. EPA-HQ-OW-2017-0203. The official public docket consists of the documents specifically referenced in this action, and other information related to this action. The official

public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is 202-566-2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this Federal Register document electronically under the “Federal Register” listings at <http://www.regulations.gov>. An electronic version of the public docket is available through EPA’s electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at <http://www.regulations.gov> to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. For additional information about EPA’s public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

*B. What is the agencies’ authority for taking this action?*

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, including sections 301, 304, 311, 401, 402, 404 and 501.

*C. What are the economic impacts of this action?*

This proposed rule is the first step in a comprehensive, two-step process to review and revise the 2015 definition of “waters of the United States.” The agencies prepared an illustrative economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that could result if there were a change in the number of positive jurisdictional determinations. The economic analysis is provided pursuant to the

requirements of Executive Orders 13563 and 12866 to provide information to the public. The 2015 CWR is used as a baseline in the analysis in order to provide information to the public on the estimated differential effects of restoring pre-2015 status quo in comparison to the 2015 CWR. However, as explained previously, the 2015 CWR has already been stayed by the Sixth Circuit, and this proposal would merely codify the legal status quo, not change current practice.

The proposed rule is a definitional rule that affects the scope of “waters of the United States.” This rule does not establish any regulatory requirements or directly mandate actions on its own. However, by changing the definition of “waters of the United States,” the proposed rule would change the waters where other regulatory requirements that affect regulated entities come into play, for example, the locations where regulated entities would be required to obtain certain types of permits. The consequence of a water being deemed non-jurisdictional is simply that CWA provisions no longer apply to that water. There are no avoided costs or forgone benefits if similar state regulations exist and continue to apply to that water. The agencies estimated that the 2015 rule would result in a small overall increase in positive jurisdictional determinations compared to those made under the prior regulation as currently implemented, and that there would be fewer waters within the scope of the CWA under the 2015 rule compared to the prior regulations. The agencies estimated the avoided costs and forgone benefits of repealing the 2015 rule. This analysis is contained in the *Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules* and is available in the docket for this action.

### **III. Public Comments**

The agencies solicit comment as to whether it is desirable and appropriate to re-codify in regulation the *status quo* as an interim first step pending a substantive rulemaking to reconsider the definition of “waters of the United States” and the best way to accomplish it. Because the agencies propose to simply codify the legal *status quo* and because it is a temporary, interim measure pending substantive rulemaking, the agencies wish to make clear that this interim rulemaking does not undertake any substantive reconsideration of the pre-2015 “waters of the United States” definition nor are the agencies soliciting comment on the specific content of those longstanding regulations. *See P&V Enterprises v. Corps of Engineers*, 516 F.3d 1021,1023-24 (D.C. Cir. 2008). For the same reason, the agencies are not at this time soliciting comment on the scope of the definition of “waters of the United States” that the agencies should ultimately adopt in the second step of this two-step process, as the agencies will address all of those issues, including those related to the 2015 rule, in the second notice and comment rulemaking to adopt a revised definition of “waters of the United States” in light of the February 28, 2017, Executive Order. The agencies do not intend to engage in substantive reevaluation of the definition of “waters of the United States” until the second step of the rulemaking. *See P&V*, 516 F.3d at 1025-26.

#### **IV. Statutory and Executive Order Reviews**

##### ***A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:***

###### ***Improving Regulation and Regulatory Review***

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, the agencies prepared an analysis of the potential avoided costs and forgone benefits associated with this action. This analysis is contained in the *Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

*B. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050-0021 and 2050-0135 for the CWA section 311 program and 2040-0004 for the 402 program.

For the CWA section 404 regulatory program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710-0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

*C. Regulatory Flexibility Act*

We certify that this action will not have a significant economic impact on a substantial number of small entities. Because this action would simply codify the legal *status quo*, we have concluded that this action will not have a significant impact on small entities. This analysis is contained in the *Economic Analysis for the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules*. A copy of the analysis is available in the docket for this action.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The definition of



“waters of the United States” applies broadly to CWA programs. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector, and does not contain regulatory requirements that might significantly or uniquely affect small governments.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Consistent with the agencies’ policy to promote communications with state and local governments, the agencies have informed states and local governments about this proposed rulemaking.

The agencies will appropriately consult with States and local governments as a subsequent rulemaking makes changes to the longstanding definition of “waters of the United States.”

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This proposed rule does not have tribal implications as specified in Executive Order 13175. This proposed rule maintains the legal *status quo*. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies will appropriately consult with tribal officials during the development of a subsequent rulemaking that makes changes to the longstanding definition of “waters of the United States.” In fact, the agencies have already initiated the formal consultation process with respect to the subsequent rulemaking.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because the environmental health risks or safety risks addressed by this action do not present a disproportionate risk to children.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*I. National Technology Transfer and Advancement Act*

This proposed rule does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This proposed rule maintains the legal *status quo*. The agencies therefore believe that this action does not have disproportionately high and adverse human health or environmental effects on minority, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, Feb. 16, 1994).

*K. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017) this proposed rule is expected to be an E.O. 13771 deregulatory action.

**List of Subjects**

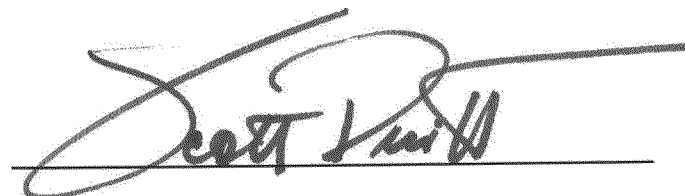
*33 CFR Part 328*

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

*40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401*

Environmental protection, Water pollution control.

Dated: 6/27/2017.

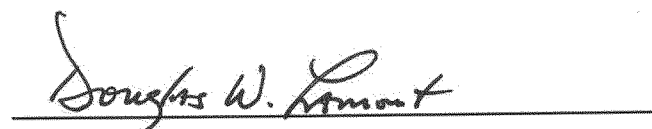
A handwritten signature in black ink, appearing to read "Scott Pruitt", is written over a horizontal line.

E. Scott Pruitt,

Administrator,

Environmental Protection Agency.

Dated: 6/27/2017.

A handwritten signature in black ink, appearing to read "Douglas W. Lamont", is written over a horizontal line.

Douglas W. Lamont,

Senior Official Performing the Duties of the Assistant Secretary of the Army for Civil Works,  
Department of the Army.

**Title 33—Navigation and Navigable Waters**

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

**PART 328—DEFINITION OF WATERS OF THE UNITED STATES**

1. The authority citation for part 328 is revised to read as follows:

**Authority:** 33 U.S.C. 1344.

2. Section 328.3 is amended by revising paragraphs (a) through (d) and adding paragraphs (e) and (f) to read as follows: •

**§328.3 Definitions.**

\* \* \* \* \*

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

(d) The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(e) The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(f) The term tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

#### **Title 40—Protection of Environment**

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 110—DISCHARGE OF OIL**

3. The authority citation for part 110 is revised to read as follows:

**Authority:** 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR Parts 1971–1975 Comp., p. 793.

4. Section 110.1 is amended by revising the definition of “Navigable waters” and adding the definition of “Wetlands” in alphabetical order to read as follows:

**§110.1 Definitions.**

\* \* \* \* \*

*Navigable waters* means the waters of the United States, including the territorial seas.

The term includes:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(b) Interstate waters, including interstate wetlands;

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(3) That are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section: Provided, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States;

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

*Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

## **PART 112 –OIL POLLUTION PREVENTION**

5. The authority citation for part 112 is revised to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.; 33 U.S.C. 2720; E.O. 12777 (October 18, 1991), 3 CFR, 1991 Comp., p. 351.

6. Section 112.2 is amended by revising the definition of “Navigable waters” and adding the definition of “Wetlands” in alphabetical order to read as follows:

### **§112.2 Definitions.**

\* \* \* \* \*



*Navigable waters* of the United States means “navigable waters” as defined in section 502(7) of the FWPCA, and includes:

(1) All navigable waters of the United States, as defined in judicial decisions prior to passage of the 1972 Amendments to the FWPCA (Pub. L. 92–500), and tributaries of such waters;

(2) Interstate waters;

(3) Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and

(4) Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

\* \* \* \* \*

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds.

\* \* \* \* \*

## **PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES**

7. The authority citation for part 116 is revised to read as follows:

**Authority:** Secs. 311(b)(2)(A) and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

8. Section 116.3 is amended by revising the definition of “Navigable waters” to read as follows:

### **§116.3 Definitions.**

\* \* \* \* \*

*Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas,” and includes, but is not limited to:

(1) All waters which are presently used, or were used in the past, or may be susceptible to use as a means to transport interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide, and including adjacent wetlands; the term *wetlands* as used in this regulation shall include those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas; the term adjacent means bordering, contiguous or neighboring;

(2) Tributaries of navigable waters of the United States, including *adjacent* wetlands;

(3) Interstate waters, including wetlands; and

(4) All other waters of the United States such as intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation or destruction of which affect interstate commerce including, but not limited to:

(i) Intrastate lakes, rivers, streams, and wetlands which are utilized by interstate travelers for recreational or other purposes; and

(ii) Intrastate lakes, rivers, streams, and wetlands from which fish or shellfish are or could be taken and sold in interstate commerce; and

(iii) Intrastate lakes, rivers, streams, and wetlands which are utilized for industrial purposes by industries in interstate commerce.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

## **PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES**

9. The authority citation for part 117 is revised to read as follows:

**Authority:** Secs. 311 and 501(a), Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), (“the Act”) and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

10. Section 117.1 is amended by revising paragraph (i) to read as follows:

### **§117.1 Definitions.**

\* \* \* \* \*

(i) *Navigable waters* means “waters of the United States, including the territorial seas.”

This term includes:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this paragraph;

(5) Tributaries of waters identified in paragraphs (i) (1) through (4) of this section, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (i) (1) through (5) of this section (“Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally included playa lakes, swamps, marshes, bogs, and similar areas such as sloughs, prairie potholes, wet meadows, prairie river overflows, mudflats, and natural ponds): *Provided*, That waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL  
POLLUTANT DISCHARGE ELIMINATION SYSTEM**

11. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

12. Section 122.2 is amended by:

- a. Revising the definition of “Waters of the United States”.
- b. Adding a Note 1 to the definition of “Waters of the United States” and the definition of “Wetlands”.

The revision and additions read as follows:

**§122.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* or *waters of the U.S.* means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate “wetlands;”

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;



(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

NOTE: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in §122.2, the last sentence, beginning “This exclusion applies . . .” in the definition of “Waters of the United States.” This revision continues that suspension.<sup>n1</sup>

---

<sup>n1</sup> EDITORIAL NOTE: The words “This revision” refer to the document published at 48 FR 14153, Apr. 1, 1983.

*Wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

\* \* \* \* \*

**PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL**

13. The authority citation for part 230 is revised to read as follows:

**Authority:** The Clean Water Act, Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

14. Section 230.3 is amended by:

- a. Redesignating paragraphs (b) through (d) as (c) through (e).
- b. Redesignating paragraphs (e) through (f) as (h) through (i).
- c. Redesignating paragraph (g) as paragraph (k).
- d. Redesignating paragraphs (h) through (l) as paragraphs (m) through (q).
- e. Reserving paragraphs (j) and (l).
- f. Redesignating paragraph (m) as paragraph (q-1).
- g. Redesignating paragraph (o) as paragraph (s).
- h. Redesignating paragraph (n) as paragraph (r).
- i. Revising newly redesignated paragraph (s).
- j. Adding the definition of “adjacent” at paragraph (b) and the definition of “wetlands” at paragraph (t).

The revision reads as follows:



### § 230.3 Definitions.

\* \* \* \* \*

(b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are “adjacent wetlands.”

\* \* \* \* \*

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands)

identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

## **PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS**

- 15. The authority citation for part 232 is revised to read as follows:

**Authority:** 33 U.S.C. 1344.

- 16. Section 232.2 is amended by revising the definition of “Waters of the United States” and adding the definition of “Wetlands” to read as follows:

### **§232.2 Definitions.**

\* \* \* \* \*

*Waters of the United States* means:

All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

All interstate waters including interstate wetlands.

All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

Which are used or could be used for industrial purposes by industries in interstate commerce.

All impoundments of waters otherwise defined as waters of the United States under this definition;

Tributaries of waters identified in paragraphs (g)(1)–(4) of this section;

The territorial sea; and

Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)– (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

*Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

## **PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN**

17. The authority citation for part 300 is revised to read as follows:

**Authority:** 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p.306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

18. Section 300.5 is amended by revising the definition of "Navigable waters" to read as follows:

### **§ 300.5 Definitions.**

\* \* \* \* \*

*Navigable waters* as defined by 40 CFR 110.1, means the waters of the United States, including the territorial seas. The term includes:

(1) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;

(2) Interstate waters, including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(i) That are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;

(iii) That are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as navigable waters under this section;

(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(6) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(7) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “Navigable waters” to read as follows:

**Appendix E to Part 300—Oil Spill Response**

\* \* \* \* \*

**1.5 Definitions. \* \* \***

*Navigable waters* as defined by 40 CFR 110.1 means the waters of the United States, including the territorial seas. The term includes:

- (a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters that are subject to the ebb and flow of the tide;
- (b) Interstate waters, including interstate wetlands;
- (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
  - (1) That are or could be used by interstate or foreign travelers for recreational or other purposes;
  - (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; and
  - (3) That are used or could be used for industrial purposes by industries in interstate commerce.
- (d) All impoundments of waters otherwise defined as navigable waters under this section;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition, including adjacent wetlands; and

(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this definition: Provided, that waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(g) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*

## **PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION**

20. The authority citation for part 302 is revised to read as follows:

**Authority:** 42 U.S.C. 9602, 9603, and 9604; 33 U.S.C. 1321 and 1361.

21. Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

### **§ 302.3 Definitions.**

\* \* \* \* \*

*Navigable waters or navigable waters of the United States* means waters of the United States, including the territorial seas;

\* \* \* \* \*

## **PART 401— GENERAL PROVISIONS**

22. The authority citation for part 401 is revised to read as follows:

**Authority:** Secs. 301, 304 (b) and (c), 306 (b) and (c), 307 (b) and (c) and 316(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251, 1311, 1314 (b) and (c), 1316 (b) and (c), 1317 (b) and (c) and 1326(c); 86 Stat. 816 et seq.; Pub. L. 92-500.

23. Section 401.11 is amended by revising paragraph (l) to read as follows:

**§ 401.11 General definitions.**

\* \* \* \* \*

(l) The term navigable waters includes: All navigable waters of the United States; tributaries of navigable waters of the United States; interstate waters; intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce. Navigable waters do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

\* \* \* \* \*



**To:** Schaefer-Gomez, Julia[Schaefer-Gomez.Julia@epa.gov]; Wesson, Dolores[Wesson.Dolores@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Hanson, Andrew  
**Sent:** Wed 7/12/2017 9:04:18 PM  
**Subject:** FW: Iowa WOTUS Comments  
[Iowa WOTUS Comments.pdf](#)

**From:** Groen, Stephanie [mailto:stephanie.groen@iowa.gov]  
**Sent:** Monday, June 19, 2017 6:41 PM  
**To:** Hanson, Andrew <Hanson.Andrew@epa.gov>; CWAwotus <CWAwotus@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>  
**Cc:** Lyon, Kayla <kayla.lyon@iowa.gov>  
**Subject:** Iowa WOTUS Comments

Andrew and Tate,

Attached you will find the State of Iowa's comments regarding Waters of the United States.

Thanks,

Stephanie

--

**Stephanie Groen** | Director of State-Federal Relations

Office of the Governor, State of Iowa

Gov. Kim Reynolds and Lt. Gov. Adam Gregg

202.624.5479 | [stephanie.groen@iowa.gov](mailto:stephanie.groen@iowa.gov)

[www.governor.iowa.gov](http://www.governor.iowa.gov)

[www.ltgovernor.iowa.gov](http://www.ltgovernor.iowa.gov)

**To:** Hanson, Andrew[Hanson.Andrew@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Wesson, Dolores[Wesson.Dolores@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Schaefer-Gomez, Julia  
**Sent:** Wed 7/12/2017 8:49:10 PM  
**Subject:** RE: stats on tribal and federalism letters  
[OR-Governor-Brown 2017-06-19.pdf](#)  
[UT-Governor-Herbert 2017-06-19.pdf](#)

Hi Drew,

**For the Governors:**

Damaris, Dolores and I just looked at your list of governor's letters and we see that you are missing two letters that are in the SharePoint (attached here). The letters you haven't counted are Utah (Gov. Herbert) and Oregon (Gov. Brown).

The SharePoint is missing one letter from Governor Reynolds (Iowa) – please send if you have that letter.

The total number of individual governors letters is 18 (and if we add the 3 governor's signatures for the NGA & WGA, *that would make it 21 total signatures from governors*). However, we prefer to file these additional signatures under the “intergovernmental associations” category.

**For the Attorney Generals:**

There are 2 individual letters received from AGs:

- 1 letter with 20 signatures total
- 1 letter from Mike DeWine (Ohio) who ALSO signed the prior letter, *which is why we have always counted 20 AG signatures total*

Also – we will recount all the letters by the end of this week to give you a final number.

Thanks

Julia & Dolores

**From:** Hanson, Andrew  
**Sent:** Wednesday, July 12, 2017 4:05 PM  
**To:** Cory, Preston (Katherine) <Cory.Preston@epa.gov>; Bennett, Tate <Bennett.Tate@epa.gov>; Greenwalt, Sarah <greenwalt.sarah@epa.gov>  
**Cc:** Schaefer-Gomez, Julia <Schaefer-Gomez.Julia@epa.gov>; Wesson, Dolores <Wesson.Dolores@epa.gov>  
**Subject:** RE: stats on tribal and federalism letters

Without putting too fine a point on it, I counted CA (Brown), MT (Bullock) and SD (Daugaard) only for their signatures for NGA and WGA, respectively. None of the three penned his own letter on WOTUS. Only Mead (WY) wrote on behalf of the state **and** also signed for NGA, hence, yielding 19 gov's signatures.

**From:** Hanson, Andrew  
**Sent:** Wednesday, July 12, 2017 3:48 PM  
**To:** Cory, Preston (Katherine) <[Cory.Preston@epa.gov](mailto:Cory.Preston@epa.gov)>; Bennett, Tate <[Bennett.Tate@epa.gov](mailto:Bennett.Tate@epa.gov)>; Greenwalt, Sarah <[greenwalt.sarah@epa.gov](mailto:greenwalt.sarah@epa.gov)>  
**Cc:** Schaefer-Gomez, Julia <[Schaefer-Gomez.Julia@epa.gov](mailto:Schaefer-Gomez.Julia@epa.gov)>; Wesson, Dolores <[Wesson.Dolores@epa.gov](mailto:Wesson.Dolores@epa.gov)>  
**Subject:** RE: stats on tribal and federalism letters

**WOTUS Commenters as of July 11, 2017**

**At a glance: 19 Governors (16 individual letters)**

**NGA letter signed by 2 co-signatories Mead and Brown, with Mead also sending his own letter from WY**

**WGA letter signed by 2 co-signatories, Bullock and Daugaard**

**2 Lieutenant Governors**

**20 Attorneys General** (all signed one letter)

**18 Intergovernmental Associations**

**61 cabinet-level state agencies**

**From:** Cory, Preston (Katherine)

**Sent:** Wednesday, July 12, 2017 3:25 PM

**To:** Bennett, Tate <[Bennett.Tate@epa.gov](mailto:Bennett.Tate@epa.gov)>; Greenwalt, Sarah <[greenwalt.sarah@epa.gov](mailto:greenwalt.sarah@epa.gov)>

**Cc:** Hanson, Andrew <[Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)>

**Subject:** RE: stats on tribal and federalism letters

I have 20 listed total (please advise if any are missing as this is from master list). Sarah, let me know which you are missing and I will print and deliver to you.

ALASKA

ARIZONA

ARKANSAS

CALIFORNIA

HAWAII

IDAHO

IOWA

KANSAS

MAINE

MISSISSIPPI

MISSOURI

MONTANA

NEBRASKA

NEVADA

NEW HAMPSHIRE

NORTH DAKOTA

SOUTH CAROLINA

SOUTH DAKOTA

VIRGINIA

WYOMING

**From:** Bennett, Tate

**Sent:** Wednesday, July 12, 2017 2:42 PM

**To:** Greenwalt, Sarah <[greenwalt.sarah@epa.gov](mailto:greenwalt.sarah@epa.gov)>

**Cc:** Cory, Preston (Katherine) <[Cory.Preston@epa.gov](mailto:Cory.Preston@epa.gov)>; Hanson, Andrew  
<[Hanson.Andrew@epa.gov](mailto:Hanson.Andrew@epa.gov)>

**Subject:** Fwd: stats on tribal and federalism letters

Preston- can you send us an updated Gov's number? We have over 20.

Sent from my iPhone

Begin forwarded message:

**From:** "Bowman, Liz" <[Bowman.Liz@epa.gov](mailto:Bowman.Liz@epa.gov)>  
**Date:** July 12, 2017 at 2:08:59 PM EDT  
**To:** "Greenwalt, Sarah" <[greenwalt.sarah@epa.gov](mailto:greenwalt.sarah@epa.gov)>, "Ford, Hayley" <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)>, "Lyons, Troy" <[lyons.troy@epa.gov](mailto:lyons.troy@epa.gov)>, "Bennett, Tate" <[Bennett.Tate@epa.gov](mailto:Bennett.Tate@epa.gov)>, "Dravis, Samantha" <[dravis.samantha@epa.gov](mailto:dravis.samantha@epa.gov)>  
**Cc:** "Jackson, Ryan" <[jackson.ryan@epa.gov](mailto:jackson.ryan@epa.gov)>  
**Subject:** RE: stats on tribal and federalism letters

This is great; thanks for sharing/pulling this together.

**From:** Greenwalt, Sarah  
**Sent:** Wednesday, July 12, 2017 2:08 PM  
**To:** Ford, Hayley <[ford.hayley@epa.gov](mailto:ford.hayley@epa.gov)>; Bowman, Liz <[Bowman.Liz@epa.gov](mailto:Bowman.Liz@epa.gov)>; Lyons, Troy <[lyons.troy@epa.gov](mailto:lyons.troy@epa.gov)>; Bennett, Tate <[Bennett.Tate@epa.gov](mailto:Bennett.Tate@epa.gov)>; Dravis, Samantha <[dravis.samantha@epa.gov](mailto:dravis.samantha@epa.gov)>  
**Cc:** Jackson, Ryan <[jackson.ryan@epa.gov](mailto:jackson.ryan@epa.gov)>  
**Subject:** Fwd: stats on tribal and federalism letters

For our metrics/press purposes.

Sent from my iPhone

Begin forwarded message:

**From:** "Eisenberg, Mindy" <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>  
**Date:** July 12, 2017 at 12:25:54 PM EDT  
**To:** "Greenwalt, Sarah" <[greenwalt.sarah@epa.gov](mailto:greenwalt.sarah@epa.gov)>  
**Subject:** stats on tribal and federalism letters

Currently about 31 tribal comment letters

At a glance:

- Most of the written comment letters are from western tribes
- 6 letters are from state/regional/national tribal groups or fish commissions that

represent multiple tribes: National Tribal Water Council, Region 10 RTOC, California Indian Environmental Alliance, Columbia River Inter-Tribal Fish Commission, Great Lakes Indian Fish and Wildlife Commission, Northwest Indian Fisheries Commission

- Most of the tribes oppose rescinding or revising the Clean Water Rule and oppose a Scalia-only approach to jurisdiction
- Only one tribe (Barona Band of Mission Indians (CA)) is supportive of the agencies' efforts to review and revise or rescind the CWR

## Federalism

In total **24 meetings** were held from April 19 to June 29, and **156 letters** were received as part of the federalism process. The breakdown of who we heard from is as follows:

- 17 governors
- 2 lieutenant governors
- 20 attorney generals (19 signed onto 1 letter)
- 62 state agencies
- 63 local-government representatives
- 18 intergovernmental associations
- 8 state associations
- 11 water & irrigation districts

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)





**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Christensen, Damaris[Christensen.Damaris@epa.gov]; Kwok, Rose[Kwok.Rose@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 6:25:07 PM  
**Subject:** RE: WOTUS-2 materials responding to Ann's request  
Scope of Clean Water Act Program Impacts Beyond Section 404 v1.docx

Hi Mindy:

Attached please find a revised 2.5-pager on WOTUS-2 **Deliberative Process / Ex. 5**  
**Deliberative Process / Ex. 5**, inserted Jim K's additions to an earlier paper on the same topic,  
and decided to add **Deliberative Process / Ex. 5**

I'll put this up on Sharepoint under "briefings."

I'll stick my head in to see if you have any questions before disappearing off to lunch.

Donna

**From:** Eisenberg, Mindy  
**Sent:** Friday, July 07, 2017 2:18 PM  
**To:** Downing, Donna <Downing.Donna@epa.gov>  
**Subject:** RE: WOTUS-2 materials responding to Ann's request

□

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 2:17 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Folded in both. Am tinkering with **Deliberative Process / Ex. 5** Should be ready in ten-ish minutes. (Although I am going to go get lunch one of these days... perhaps in eleven minutes?)

DMD

**From:** Eisenberg, Mindy

**Sent:** Friday, July 07, 2017 2:16 PM

**To:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Yes, this morning's. I was thinking more about **Deliberative Process / Ex. 5**

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 1:17 PM

**To:** Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Cc:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Subject:** RE: WOTUS-2 materials responding to Ann's request

Thanks Damaris. I'll look and see what Jim had to say. I think Mindy's suggested edits are on the paper created this morning, but it can also benefit from Jim's insights on the earlier paper.

Donna

**From:** Christensen, Damaris

**Sent:** Friday, July 07, 2017 1:16 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Downing, Donna <[Downing.Donna@epa.gov](mailto:Downing.Donna@epa.gov)>; Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>

**Subject:** Re: WOTUS-2 materials responding to Ann's request

I'm still at lunch but I believe the WQS program made some suggested edits to this final version after it was used. Maybe forwarded by Jim Keating?

Sent from my iPhone

On Jul 7, 2017, at 1:04 PM, Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)> wrote:

Thanks very much! On the paper regarding **Deliberative Process / Ex. 5** can we add something about **Deliberative Process / Ex. 5** Also, in terms of **Deliberative Process / Ex. 5**, can we caveat it that it will be **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Thanks!

Mindy Eisenberg

Acting Director, Oceans, Wetlands & Communities Division

Office of Wetlands, Oceans and Watersheds

U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T

Washington, DC 20460

(202) 566-1290

[eisenberg.mindy@epa.gov](mailto:eisenberg.mindy@epa.gov)

**From:** Downing, Donna

**Sent:** Friday, July 07, 2017 12:43 PM

**To:** Eisenberg, Mindy <[Eisenberg.Mindy@epa.gov](mailto:Eisenberg.Mindy@epa.gov)>

**Cc:** Kwok, Rose <[Kwok.Rose@epa.gov](mailto:Kwok.Rose@epa.gov)>; Christensen, Damaris <[Christensen.Damaris@epa.gov](mailto:Christensen.Damaris@epa.gov)>

**Subject:** WOTUS-2 materials responding to Ann's request

Hi Mindy:

Ann asked for **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Items 1 and 2 are attached. Items for #3 include materials we prepared for the Administrator's briefing in late March, as well as other materials that might be useful. Note that the March briefing materials included a short summary of **Deliberative Process / Ex. 5**

**Deliberative Process / Ex. 5**

Please let me know if you would like additional materials in response to Ann's request.  
Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

[downing.donna@epa.gov](mailto:downing.donna@epa.gov)

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004



**To:** Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]  
**Cc:** Kwok, Rose[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]  
**From:** Downing, Donna  
**Sent:** Fri 7/7/2017 5:17:50 PM  
**Subject:** As requested: materials for Sara's calls to initiate early interagency engagement on WOTUS-2  
Early Inter-Agency Engagement Overview.docx  
TPs for political-level calls re early interagency engagement Draft v1.docx

Hi Mindy:

## Deliberative Process / Ex. 5

## Deliberative Process / Ex. 5

Please let me know if you have any questions or suggestions. Thanks!

Donna

Donna Downing

Jurisdiction Team Leader

Office of Wetlands, Oceans & Watersheds

U.S. Environmental Protection Agency

ph: (202) 566-1367

downing.donna@epa.gov

USPS Address:

1200 Pennsylvania Avenue, NW

Washington, DC 20460

Delivery Address:

1301 Constitution Avenue, NW, room 7214-D

Washington, DC 20004